The Central Law Journal.

ST. LOUIS, JANUARY 16, 1891.

THE student of legal problems will find much to interest and puzzle him in the case of Keller v. Eureka Brick Machine Co., recently decided by the St. Louis Court of Appeals, and reported on page 55 of this issue. The question there for determination, is all the more perplexing, by reason of the fact that through the dearth of authorities upon the subject, it must be solved largely by the application of first principles. The question in the case is, whether a stockholder in a corporation who has lost or mislaid his certificates of stock, upon tendering sufficient indemnity, is entitled to the aid of a court of equity to compel the corporation to issue to him other certificates which on their face purport to be originals, and which contain no notice that they are issued in lieu of those claimed to have been lost. The opinion of the court, in the negative, by Judge Thompson, though able and plausible, is not, to our mind, entirely convincing, and certainly does not seem to be equitable.

THE banking community seems to have been considerably disturbed by the recent decision of Judge Gresham, in the case of Commercial National Bank v. Hamilton National Bank, which is in effect a blow at old and familiar rules governing collections. The question in that case, succinctly stated, was whether a bank which receives a draft that has previously been specially indorsed for collection through and by two or more banks, is liable to the first of these banks for the amount collected. Judge Gresham decided in the affirmative. The facts were, that the plaintiff sent to Fletcher & Sharp, bankers at Indianapolis, a draft indorsed "for collection." Fletcher & Sharp indorsed the draft for collection, and sent it to the defendant, at Ft. Wayne. The defendant collected the draft, and the same day credited Fletcher & Sharp with the proceeds, and advised them of the fact. On receipt of this advice, Fletcher & Sharp charged the defendant, and credited the plaintiff, with the amount, and notified the latter. On July 15th the defendant posted a letter at Ft. Wayne, addressed to Winslow, Lanier & Co., bankers at New York, directing them to credit Fletcher & Sharp with the amount collected. The defendant, in good faith, directed that the credit be given to Fletcher & Sharp in New York, not knowing that they were indebted to Winslow, Lanier & Co. Fletcher & Sharp failed, on July 14th, which failure was known to the defendant in ample time to countermand the order mailed to New York. The plaintiff addressed a letter to the defendant, claiming the collection, and demanding that it be remitted. The demand was refused, and this suit was brought to recover the amount. The demand was sustained by the court, because the indorsement "for collection" was clear and unambiguous. By such special indorsement, every holder received notice that he is merely an agent or subagent of the legal holder of the note, and had no power but that of a trustee for its transmission to the first indorser, and no testimony as to usage and custom among banks, can impair the legal force of the indorsement. The court relied chiefly upon White v. National Bank, 102 U. S. 658. Attention has been called to the fact that, so far as that case is concerned, the statement upon which Judge Gresham relied here, was a mere *dictum*, and that the point was not actually decided by the court. Without reference to whether the view of Justice Miller, in the White case, was or was not a mere *dictum*, and therefore authority upon the question, the decision of Judge Gresham is undoubtedly correct upon principle, though there is much to be said on the other side arising out of the character of bank deposits and negotiable paper. A draft, it is said, is a "courier without baggage." But if the draft bears several special indorsements, each of these is a distinct piece of baggage. Each gives notice to the last holder of the existence of possible liens. For instance, it may be said of this case, that the Hamilton bank received such an indorsed draft. The only course usage prescribed in dealing with it, was to start the proceeds of the draft, through Fletcher & Sharp, to the final destination, the plaintiff bank, that each of these sets of liens might be discharged in

its own order, by the parties cognizant of them. This the defendants did. And if the proceeds were diverted from their intended use by acts of war, by fire or by accident, it was not through any fault of the defendant, and therefore some one else ought to bear the loss. In other words, if this decision is upheld by the Supreme Court of the United States, as some doubt, it puts upon the collecting bank, the duty in each instance, of following the proceeds of drafts collected by them to their final destination, no matter through how many hands it may be obliged to go. A recent case, wherein very much the same question is presented, is Armstrong v. National Bank, decided by the Court of Appeals of Kentucky. There it was held that where a bank which has received a draft for collection, sends it to another bank for that purpose, and, on being advised that the latter bank has collected the draft, credits the depositor, and then becomes insolvent without having received the money from the collecting bank, the depositor remains the owner of the draft, and is entitled to its proceeds from the collecting bank as against the receiver and the creditors of the insolvent bank.

NOTES OF RECENT DECISIONS.

FEDERAL COURTS — JURISDICTION OF THE UNITED STATES SUPREME COURT — APPEAL FROM STATE COURT—FEDERAL QUESTION.—The Supreme Court of the United States, in the case of Johnson v. Risk, 11 S. C. Rep. 111, made an important ruling as to its jurisdiction over questions litigated in a State court of a federal nature. The court, in effect, held in this case, that if the plaintiff in error wished to claim that this cause was disposed of by the decision of a federal question, he should have obtained the certificate of the supreme court to that effect, or the assertion in the judgment that such was the fact. Where there is a federal question, but the case may have been disposed of on some other independent ground, and it does not appear on which of the two grounds the judgment was based, then, if the independent ground was not a good and valid one, sufficient of itself to sustain the judgment, the Supreme Court of the United States will take jurisdiction of the case, because when put to inference as to what points the State court decided, this court ought not to assume that it proceeded on grounds clearly untenable. But where a defense is distinctly made, resting on local statutes, this court ought not, in order to reach a federal question, resort to critical conjecture as to the action of the State court in the disposition of such defense. The court, after stating the facts and commenting upon the decisions of the Supreme Court of Tennessee in relation to the statutes of limitations of that State bearing upon the case, hold, that inasmuch, therefore, as, if the supreme court of the State had sustained the defense of the statute of limitations, it cannot perceive that such decision would have been erroneous, it does not appear that the judgment, as rendered, could not have been given without deciding the federal question, or that its decision was necessary to the determination of the cause, and that it was actually decided. The court cited Gormley v. Clark, 134 U. S. 338; De Sassure v. Gaillard, 127 U. S. 216; Klinger v. Missouri, 13 Wall. 257.

CRIMINAL LAW — LARCENY— ATTEMPT TO COMMIT.— The Court of Appeals of New York, in People v. Moran, 25 N. E. Rep. 412, hold that under Pen. Code N. Y. § 34, defining an attempt as "an act done with intent to commit a crime, and tending but failing to effect its commission," a person who in a crowd is seen to thrust his hand into the pocket of another, and withdraw it empty, can be convicted of an attempt to commit larceny, even though its commission may have been impossible because there was nothing in the pocket. Ruger, C. J., says:

The question whether an attempt to commit a crime has been made, is determinable solely by the condition of the actor's mind, and his conduct in the attempted consummation of his design. People v. Lawton, 56 Barb. 126; McDermott v. People, 5 Park. Crim. R. 104; Mackesey v. People, 6 Park. Crim. R. 114; 1 Amer. & Eng. Enc. Law, tit. "Attempt." So far as the thief is concerned, the felonious design and action are then just as complete as though the crime could have been, or, in fact, had been, committed, and the punishment of such offender is just as essential to the protection of the public, as of one whose designs have been successful. In the language of Bouvier's Law Dictionary, an "attempt" is an endeavor to do an act carried beyond mere preparation, but falling short of execution. Some conflict has been observed in English authorities on this subject, and it

may be conceded that the weight of authority in that country is in favor of the proposition that a person cannot be convicted of an attempt to steal from the pocket, without proof that there was something in the pocket to steal. Reg. v. McPherson (1857), Dears. & B. Cr. Cas. 197; Reg. v. Collins (1864), Leigh & C. 471. The cases in England, however, are not uniform on this subject, and the principle involved in the cases above cited was, we think, otherwise stated in Reg. v. Goodall, 2 Cox Crim. Cas. 41, where an attempt to commit a miscarriage was held to have been perpetrated on the body of a woman who was not at the time pregnant. See, also, Reg. v. Goodchild, 2 Car. & K. 293. In this country, however, the courts have uniformly refused to follow the cases of Reg. v. McPherson and Reg. v. Collins, and have adopted the more logical and rational rule that an attempt to commit a crime may be effectual, although, for some reason undiscoverable by the intending perpetrator, the crime, under existing circumstances, may be incapable of accomplishment. It would seem to be quite absurd to hold that an attempt to steal property from a person could not be predicated of a case where that person had secretly and suddenly removed the contents of one pocket to another and thus frustrated the attempt, or had so guarded his property that it could not be detached from his person. An attempt is made when an opportunity occurs, and the intending perpetrator has done some act tending to accomplish his purpose, although he is baffled by an unexpected obstacle or condition. Many efforts have been made to reach the North Pole, but none have thus far succeeded, and many have grappled with the theory of perpetual motion without success—possibly from the fact of its non-existence—but can it be said in either case that the attempt was not made? It was well stated by Justice Gray in Com. v. Jacobs, 9 Allen, 274, that "whenever the law makes one step towards the accomplishment of an unlawful object with the intent or purpose of accomplishing it criminal, a person taking that step, with that intent or purpose, and himself capable of doing every act on his part to accomplish that object, cannot protect himself from responsibility by showing that, by reason of some fact unknown to him at the time of his criminal attempt, it could not be fully crrried into effect in the particular instance."

The precise question here involved, under a similar statute, was considered in the case of Com. v. McDonald, 5 Cush. 365, where it was held that a person "may make an attempt—an experiment—to pick a pocket by thrusting his hand into it and not succeed, because there happens to be nothing in the pocket. Still, he has clearly made the attempt, and done the act towards the commission of the offense." The case of People v. Jones, 46 Mich. 441, 9 N. W. Rep. 486, is also in point. There the accused stuck his hand into the outside cloak pocket of a woman, but there was nothing in the pocket. It was held that the defendant was well convicted of the crime of attempting to commit larceny. The same question, under circumstances almost identical with those existing in this case, arose in State v. Wilson, 30 Conn. 500, and the court there said "the perpetration of the crime was legally possible, the persons in a situation to do it, the intent clear, and the act adopted to the successful perpetration of it; and, whether there was or not property in the pocket, was an extrinsic fact, not essential to constitute the attempt." In Clark v. State, 86 Tenn. 511, 8 S. W. Rep. 145, the question was also considered, and it was held, where the proof showed that the defendant had opened the money drawer of one Porbles, that a charge to the jury stating, if the defendant's "purpose was to steal when he opened the drawer, and his opening it was a part of the act designed by him for getting possession of the prosecutor's money, he would be guilty of an attempt to commit larceny, even though, at that particular time, there was no money in the cash drawer," was correct. The case of Reg. v. Collins was there considered, and disapproved. There are numerous other cases in this country, analogous to those above cited, in which it has been held that an intent to commit a crime might be predicated of a condition which rendered it impossible for the crime to have been in fact committed. Among them is the case of State v. Beal, 37 Ohio St. 108, where the defendant was indicted for the crime of burglariously entering into the warehouse of William Houts, with intent to steal, and take away his property. It was held, the burglarious entrance having been shown, that the defendant could be convicted, although it was proven that the warehouse did not contain any property capable of being stolen. In Rogers v. Com., 5 Serg. & R. 462, the indictment charged that the defendant, with intent feloniously to steal and carry away the money of one Earle from his person, put his hand into the pocket of the coat of said Earle. The court, overruling certain exceptions to the indictment, said: "The intention of the person was to pick the pocket of Earle of whatever he found in it, and, although there might be nothing in the pocket, the intention to steal is the same. He had no particular intention to steal any particular article, for he might not know what was in it." To a similar effect are the cases of Hamilton v. State, 36 Ind. 280; People v. Bush, 4 Hill, 134; and People v. Lawton, *supra*. The elementary writers in this country have uniformly stated the rule as illustrated by the cases cited, and disapproved the English cases of Reg. v. McPherson and Reg. v. Collins; 1 Bish. Crim. Law, § 741; 1 Whart. Crim. Law, § 186.

CONFLICT OF LAWS – JUDICIAL NOTICE — REPLEVIN BOND.—As to whether courts of a State will take judicial notice of the laws of another State, was decided in the case of Osborne v. Blackburn, 47 N. W. Rep. 175, by the Supreme Court of Wisconsin. There it was held that in an action in Wisconsin on a replevin bond, given in an action in Minnesota, the court is not bound to take judicial notice of the laws of that State regulating the action of replevin, or, in the absence of proof, it will be presumed that such laws are the same as those of Wisconsin. Cole, C. J., says:

In the case of Rape v. Heaton, 9 Wis. 329, the law upon this question was thus laid down: "The act of congress requiring such faith and credit to be given to judgments, as they would have in the States where rendered, does not profess to determine in what manner the courts shall ascertain such effect, and cannot be construed as making it imperative on them to take judicial cognizance of the laws of other States. There are many cases where the courts are bound to decide upon contracts according to the laws of other States, where they were made, or are to be performed, but it has never been held that in such cases they were bound to take judicial notice of those laws. So here

the constitution and act of congress require the effect and credit of judgments to be determined according to the law of the State where rendered, but leave the manner in which courts shall ascertain those laws to be determined by the general principles of pleading and proof applicable to the subject. The act of congress does not undertake to determine this, and, even if it did, it is very doubtful whether it would be competent for congress to provide in what manner the laws of one State should be proved in another." Page 339. And the opinion proceeds to state the decision of this court on the point in this language: "The true rule is that in such cases courts are not bound to take actual notice of the laws of other States, in the absence of all proof, but may presume them to be in accordance with their own. So that whenever any difference is relied on, it is incumbent on the party relying on it, to prove such difference for the information of the court." The doctrine of Rape v. Heaton was followed in Walsh v. Dart, 12 Wis. 635; Hull v. Augustine, 23 Wis. 383; Pierce v. Railway Co., 36 Wis. 283; Horn v. Railway Co., 38 Wis. 462; Kellam v. Toms, *Id.* 592. But the question is so fully and ably considered by Mr. Justice Paine, in Rape v. Heaton, both upon principle and authority, that it is unnecessary to extend discussion here, or to attempt to fortify the reasoning which led the court to the conclusion so arrived at. We are all well aware that there are conflicting decisions upon the question, but we think Rape v. Heaton lays down the better rule and is sustained by the greater weight of authority. It is claimed that the Supreme Court of the United States, in Carpenter v. Dexter, 8 Wall. 513, establishes a different rule. One question in that case was whether it was necessary to prove the official character of the officer taking the acknowledgment of a deed. The court held that it was not. Unless the statute required the evidence of official character to accompany the official act which it authorizes, no such proof was necessary. And the court said: "Where one State recognizes acts done in pursuance of the laws of another State, its courts will take judicial cognizance of those laws, so far as it may be necessary to determine the validity of the acts alleged to be in conformity with them. In this case, also, the laws of New York are, by stipulation of parties, considered as evidence." In Hanley v. Donoghue, 116 U. S. 1, 6 Sup. Ct. Rep. 242, the court had occasion to consider the question. Mr. Justice Gray, in delivering the opinion of the court, says: "Upon principle, therefore, and according to the great preponderance of authority (as is shown by the cases collected in the margin), whenever it becomes necessary for a court of one State, in order to give full faith and credit to a judgment rendered in another State, to ascertain the effect which it has in that State, the law of that State must be proved like any other matter of fact. The opposing decisions in Ohio v. Hinchman, 27 Pa. St. 479, and Paine v. Insurance Co., 11 R. I. 411, are based upon the misapprehension that this court, on a writ of error to review a decision of the highest court of one State upon the faith and credit to be allowed to a judgment rendered in another State, always takes notice of the laws of the latter State; and upon the consequent misapplication of the postulate that one rule must prevail in the court of original jurisdiction and in the court of last resort." Again, in Chicago, etc. R. Co. v. Wiggins Ferry Co., 119 U. S. 616, 7 Sup. Ct. Rep. 398, the court, when considering the effect of the constitutional requirement that "full faith and credit shall be given in each State to the public acts and records and judicial proceedings of every other State," say it implies that the public acts of every State shall be given the same effect by the courts of another State that they had, by law and usage, at home; and the learned chief justice says: "Whenever it becomes necessary under this requirement of the constitution for a court of one State, in order to give faith and credit to a public act of another State, to ascertain what effect it has in that State, the law of that State must be proved as a fact. No court of the State is charged with knowledge of the laws of another State, but such laws are, in that court, matters of fact, which like other facts, must be proved before they can be acted upon. This court, and the other courts of the United States, when exercising their original jurisdiction, take notice, without proof, of the laws of the several States of the United States; but in this court, when acting under its appellate jurisdiction, whatever was matter of fact in the court whose judgment or decree is under review, is matter of fact here." In view of these excerpts, we think the learned counsel is mistaken in the assumption, that the Supreme Court of the United States has laid down a rule in conflict with Rape v. Heaton.

USAGE AND CUSTOM—PAROL EVIDENCE.—The Supreme Court of Indiana, in the case of Scott v. Hartley, 25 N. E. Rep. 826, decided an interesting question as to the admissibility of evidence of usage and custom to control a contract. In that case, which was an action for breach of contract to purchase from plaintiff corn in Indiana at a certain price, "net, track, Philadelphia, Union Line," brought on defendants' refusal to receive the corn, defendants alleged a custom of persons engaged in the grain trade that, upon a sale of grain, to be delivered in Philadelphia, or other cities in the Eastern States, at a stated price on the "track," or "net," or "net track," such grain was to be delivered on the track at such city without payment of freight by the seller, and that the purchaser should pay the freight and deduct it from the purchase price of the grain, and thus fix the net price; the rates of freight thus paid being fixed by contracts between the purchasers and the transportation companies. It was held that there was no ambiguity in the terms of the contract, and evidence of such custom, tending to contradict the contract as to the "net price," was admissible. Berkshire, C. J., says, *inter alia:*

The contention of the appellants, pure and simple, is to allow them to introduce parol evidence for the purpose of transforming the contract which they and the appellee made into another and different contract. They insist that the terms of the contract, as written, are not its terms, and that the true meaning of the contract is to be found in the usage which they contend prevailed when the contract was executed. If there is one proposition better settled than others by

a long line of decisions from this court, that proposition is that parol evidence will not be allowed to vary or control the terms and conditions contained in a written contract. The rule is so familiar that we do not feel called upon to refer to the cases, or any of them. It is clear, we think, that this case is within the rule. On the point that custom and usage cannot be given in evidence to contradict the express or implied terms of a contract free from ambiguity, in addition to the cases already cited, see note to Smith v. Clews, 11 Amer. St. Rep. 632, where many cases are collected and cited. Among others cited, we call especial attention to Hopper v. Sage, 112 N. Y. 530, 20 N. E. Rep. 350.

LANDLORD AND TENANT—COVENANT—REPAIRS—FALLING WALL.—In Ward v. Fagin, 14 S. W. Rep. 738, the Supreme Court of Missouri decide, that in the absence of covenants to repair, a landlord's duty to his tenant does not require that he should shore up a wall endangered by an excavation of the adjoining lot, although he has received due notice thereof, and he is not liable for an injury caused to the tenant's stock of goods by the falling of the wall in consequence of negligent excavation. Sherwood, J., says:

Aside from an express covenant to that effect, a landlord is not bound to keep the leased premises in repair, nor is he responsible in damages to his tenant for injuries resulting to the latter from the non-repair of the leased premises. In the absence of contractual obligation, the landlord as regards his tenant is only liable for acts of misfeasance, but not of non-feasance. This statement of the law is abundantly supported by the authorities, and in this State from an early period the familiar rule has been followed. Morse v. Maddox, 17 Mo. 573, and cases cited. The same principle is announced in the later case of Peterson v. Smart, 70 Mo. 38. Of course, if the landlord is not bound to repair unless upon covenant so to do, it must logically follow that any injuries arising from a failure on his part to repair, can give no cause of action to the tenant, whether resulting to the tenant's goods or to his person. If the landlord owes no duty to his tenant in this regard, then certainly negligence cannot be imputed to him, for negligence can only spring from unperformed duty. Cooley, Torts, (2d ed.) 791; Hallihan v. Railroad Co., 71 Mo. 113. And if it be conceded, as it must from the authorities, that the landlord is not bound to keep the leased premises in repair, the same principle will apply whether the tenant be lessee of the whole premises or of only a portion thereof; for what is true of the integer of non-liability must be equally true of each of its component fractions. From the same premise, to-wit, that a landlord is not bound to repair, it must follow as a necessary deduction that any injury to the leased premises, and through them to the tenant, caused by the negligent act of third persons, cannot create or cast on the landlord a liability which, prior to such negligent act, had no existence. That a landlord is not responsible in cases of this sort to rebuild or repair where a tenant was but the lessee of a portion of the tenement house, and such house was damaged by fire, and thus loss occasioned to the tenant's goods, has been directly adjudicated. Doupe v. Genin, 45 N. Y. 119. In another case (Howard v. Doolittle, 3 Duer. 464), it was expressly ruled that the lessor was not responsible for the expenses incurred in shoring up a building leased by him, in order to prevent injuries thereto by the removal of a building by the adjoining proprietors. In Sherwood v. Seaman, 2 Bosw. 127, the landlord had leased to a tenant the building on lot 252 for a saloon and restaurant, for a term of three years. Grosvenor, the owner of lot 251, notified the landlord of 252 that he intended to excavate lot 251 to lay the foundation of a building thereon, in the course of which excavation the building on lot 251 fell, and destroyed the lessee's furniture and fixtures to a large amount; and upon these facts it was ruled that the landlord was not liable. So, too, in California, in similar circumstances, the tenant was killed by the falling walls of the building he occupied, in consequence of an excavation being made on an adjoining lot by the co-terminous proprietor; and although the landlord of the building had due notice of the excavation, and that in consequence thereof the wall would fall unless proper means were taken to prevent it, and none were taken, yet is was ruled that the landlord was under no obligation to uphold or to repair, and there being therefore no breach of duty, on his part, no action could be maintained against him by the administratrix of the decedent for damages for the alleged negligent act aforesaid. Brewster v. DeFremery, 33 Cal. 341. Authorities on this point, and illustrative of the general principle here involved, might be greatly multiplied. The industry of counsel for defendant has collated many of them. An elaborate discussion of this subject will be found in 6 Amer. Law Rev. 614, in which it would seem that most of the authorities then extant are reviewed. The cases of Looney v. McLean, 129 Mass. 33, and Toole v. Beckett, 67 Me. 544, are not in harmony with well-considered cases elsewhere, and the principle announced in those cases has been repudiated. Krueger v. Ferrant, 29 Minn. 385, 13 N. W. Rep. 158; Indiana, Purcell v. English, 86 Ind. 34; and Wisconsin, Cole v. McKey, 66 Wis, 500, 29 N. W. Rep. 279. The like position is taken in Canada. Humphrey v. Wait, 22 U. C. C. P. 580.

MORAL OBLIGATION AS A CONSIDERATION FOR CONTRACTS.

In taking a cursory view of this subject, the idea necessarily comes to us that it is of the utmost importance to find out the meaning of the term "consideration." In our studies on contracts, we are informed that the consideration is the material cause which moves a contracting party to enter into a contract, and, consequently, it is the very nature and essence thereof. Also, that a contract without a consideration is merely a *nude pact*, because the contractor engages to serve the contractee without compensation. The naked promises, or contracts, if you please, were at one time enforceable under certain conditions. The Roman law decreed

that if they were worded and formed according to certain stipulations, then they should be enforceable. This formality corresponded in some measure to our seal, and implied a consideration, in that the solemnity attendant upon the occasion imputed deliberation, caution and complete assent. This was found to be too liberal a doctrine for the purpose of contracts, and more stress was given to the *kind* of consideration comprehended in the terms of the instrument.

Blackstone divides consideration into four distinct heads, which are, as Parsons says, "logically exact and exhaustive." But, from a common law standpoint, their utility has not been of much practical value. In his second book he comments as follows: "A consideration of some sort or other is so absolutely necessary, to the forming of a contract, that a *nudum pactum*, or agreement to do or to pay something on one side without any compensation on the other, is totally void in law, and, therefore, our law has adopted the maxim of the civil law, "that from a *nude pact* no action arises." But any degree of reciprocity will prevent the pact from being nude; nay, even if the thing be founded upon a prior moral obligation, it is no longer a *nude pact*.

The common law seems, then, to be well settled, that where a benefit accrues, or has accrued, to him who makes the promise, or contract, it will be a sufficient consideration for such contract. But as to whether an obligation existed, where there was strictly a moral consideration, was not so easily settled. Mr. Baron Parke once said, "a mere moral consideration is nothing," which expression is *prima facie* true. It was difficult to distinguish between moral considerations, as to which were and which were not enforceable at law. Parsons, in his work on contracts, lays it down as a rule, that a moral obligation to pay money, or to perform a duty, is a good consideration for a promise to do so, where there was originally an obligation to pay the money or do the duty, which was enforceable at law but for the interference of some rule of law.

Thus a promise to pay a debt, contracted during infancy, or one barred by the statute of limitations, is good without other consideration than the previous legal obligation. But the morality of the promise, however certain, or however urgent the duty, does not of itself suffice for a consideration. Thus, a consideration, to be a good one, need not be founded on present legal obligation, as it is enough if there is a present moral obligation on an antecedent legal obligation. Bouvier tells us that "a moral obligation is a duty which one owes and which he ought to perform, but which he is not legally bound to fulfill." The doctrine that an antecedent moral obligation, as thus defined, is a good consideration for an express contract, has prevailed for a long time in the courts, both of England and of this country. In the case of Hawkes v. Saunders,[1] Saunders had a legacy bequeathed to him, and Hawkes was appointed executrix. Assets ample to pay all debts and legacies of the testator came into the hands of the executrix, and she, in consideration of this fact, executed to Saunders her written promise to pay his legacy. In an action on contract Saunders got judgment and the case was appealed. Lord Mansfield, in delivering his opinion, said: "It is admitted at bar, that after verdict it must be taken to have been a promise in writing, and that there were assets. This reduces the case to the point as to whether the circumstances of the defendant having assets sufficient to pay all debts and legacies is, or is not a sufficient consideration for her to make a promise to pay the legacy in question. Where a man is under an equitable or a legal obligation to pay, the law implies a promise, though none was ever made. A legal, or equitable duty is a sufficient consideration for an actual promise. Where a man is under a moral obligation, which no court of law or of equity can enforce, and promises, the honesty and rectitude of the thing is a consideration." Justice Buller, concurring, said: "The true rule is that whenever a defendant is under a moral obligation, or is liable in conscience to pay, that is a good consideration."

It seems that a distinction is made where the antecedent obligation was not at the time enforceable at law. The principle is fully discussed in Eastwood v. Kenyon,[2] where a ward, after reaching majority, assumed the payment of money voluntarily previously expended by the guardian for the ward's inter-

[1] Cowper's Reports, 390.
[2] Adolphus & Ellis' Reports, 447.

est. In its opinion the court says: "That an express promise can only revive a precedent good consideration which might have been enforced at law had it not been suspended by some positive rule of law, but gives no cause of action where the antecedent obligation could not be enforced at law."

At the present time, in England and in this country, the courts hold that a mere moral obligation is not sufficient to support an express contract. In Massachusetts it was held that where an adult son taken sick among strangers was cared for, the subsequent promise of the father to pay the expense was not binding. In Connecticut, a promise of a son to pay an old debt of his father was held void for want of consideration. But where there was a good antecedent consideration, and the present moral obligation of such is the only consideration for a new contract, then the contract will be held valid in law. In Pennsylvania, in the case of Willing v. Peters,[3] the supreme court decided that a promise by a debtor after execution of a voluntary release under seal by the creditor, at the debtor's request, to pay the balance of the debt, is founded upon a sufficient consideration and is binding. The Supreme Court of Massachusetts, in Ilsley v. Jewett,[4] held that where a defendant *ex contractu* relies upon the statute of limitations, but judgment is rendered against him upon proof of his having made a new promise which removed the statute bar, the judgment is considered as rendered upon the old contract. In Hemphill v. McClimans,[5] the defendant, a married woman, induced the plaintiff to expend time and labor upon a saw-mill for her son, by promising that she would pay for the work. Plaintiff relied upon her promise. She was afterwards divorced and renewed her promise. The court held that the plaintiff made the first bargain, well knowing that the defendant was a married woman, and was bound to know that her contract in law was null and void. He trusted to her justice, and she had it in her power to cheat him; but when she made her last promise the legal disability was gone.

The rule is a very familiar one, that an existing moral duty not enforceable at law is a sufficient consideration for an express promise to perform a duty. In Commissioners v. Perry,[6] there was an action of canal commissioners to recover a subscription. The legality of the contract was questioned, with verdict for the plaintiff. On appeal the court held: "A moral obligation, as herein expressed, is sufficient to support an action on an express promise, and undertakings by written subscriptions to contribute money or other property in aid of public works are valid contracts and can be enforced in courts of justice."

It appears, then, in summing up the decisions upon this question, that it may be taken as a settled rule, that a contract, the consideration of which is a previous moral obligation, is generally enforceable in courts of law. Two late exceptions have recently occurred in England, and may appropriately be added here: Under the bankruptcy act of 1869, "debts discharged cannot be revived by a promise made after adjudication." Under the infant's relief act of 1874, "any promise, necessaries excepted, to pay a debt contracted during infancy is void."

CURTIS P. SMITH.

Dallas, Tex.

[3] 12 Serg. & R. 177.
[4] 3 Metc. 439.
[5] 24 Pa. St. 371.
[6] 5 Ohio, 57.

EQUITY—LOST CERTIFICATE OF STOCK—DUPLICATE.

KELLER V. EUREKA BRICK MACHINE CO.

St. Louis Court of Appeals, December 23, 1890.

1. A stockholder in a corporation, who has lost or mislaid his certificates of stock, even upon tendering sufficient indemnity, is not entitled to the aid of a court of equity to compel the corporation to issue to him other certificates which on their face purport to be original and which contain no notice that they are issued in lieu of those claimed to have been lost, in the absence of any statute, by-law, or other express obligation so to do.

2. A court of equity has power under such circumstances, upon the tendering of a sufficient indemnity bond, to compel the issue of duplicate certificates by the corporation, which on their face recite that they are duplicates and issued in lieu of those lost.

THOMPSON, J.: This was an action in the nature of a suit in equity to compel the defendant to issue to the plaintiff other certificates of stock in the place of his original certificates alleged to have been lost, without the word "duplicate" or any other words being written upon them to in-

dicate that they were issued in place of other certificates which are still outstanding. Such proceedings were had in the circuit court that the court ordered the defendant to issue such a new certificate to the plaintiff, without any such words being upon it, the plaintiff having given to the defendant a bond of indemnity in the sum of $20,000, containing the following clause: "In consideration of said Eureka Brick Machine Manufacturing Company issuing to said H. H. Keller duplicate shares of stock in said company in the place of said shares lost (the parties bind themselves) to hold themselves responsible to said company for any loss they may be liable for, in the issuing or by reason of having to issue said duplicate shares of stock to said Keller." This bond was signed by George C. Hull, the cashier of the bank to whom the certificates were delivered by the plaintiff, and also by James Hull, the brother to whom he claims to have delivered them for safe keeping—a circumstance which tends to show their good faith in the matter and their willingness to assist him in repairing, as far as possible, the damage accruing to him from the unfortunate accident.

The certificates alleged to have been lost were certificates for one hundred shares of stock in the aggregate in the defendant company, of the nominal value of $100 per share. The plaintiff was one of the original members of the corporation and its first president. The certificates were issued to him directly by the company and in his name. He delivered them to the National Bank of St. Joseph as collateral security for the faithful performance by him of an obligation. He testifies that when so delivered they were not indorsed in blank; but Mr. Hull, the cashier of the bank testifies that they were so indorsed, not from positive recollection, but from the fact that it was his habit not to receive stock as collateral security which was not so indorsed. The transaction took place after banking hours, and the cashier delivered the certificates to his brother for safe keeping. Some two months afterwards, such events having supervened that the plaintiff became entitled to have them redelivered to him, a search was made for them and they could not be found. James Hull, the brother of the cashier who was collector of State and county revenue at St. Joseph, denies that the certificates were ever delivered to him, and testifies that he never saw them, but does not deny that an envelope containing them may have been left at his office.

It further appears that upon the plaintiff tendering to the defendant the bond of indemnity with the condition above quoted, the latter tendered to him a new certificate containing the word "duplicate" and also the following words: "These certificates issued in lieu of Nos. 45, 46, 47, and 48 claimed to have been lost and unindorsed;" and also, in another place, the words "duplicate original claimed to have been lost," the evidence also shows that the plaintiff could have sold the shares if he could have produced a certificate which did not contain words showing that it had been issued in lieu of another claimed to have been lost.

It is thus perceived that the case which arises on this record is whether, upon tendering sufficient indemnity, a stockholder who has lost or mislaid his certificate, is entitled to the aid of a court of equity to compel the corporation to issue to him other certificates which on their face purport to be originals and which contain no notice that they are issued in lieu of those claimed to have been lost, in the absence of any statute, by-law or other express legal or conventional obligation so to do.

We lay out of view the case where the original certificate is shown by satisfactory evidence to have been destroyed, for that is not the case before us, and we do not wish to be understood as intimating any opinion as to what a court of equity ought to do under such circumstances. We also wish to be understood as not denying the jurisdiction of a court of equity to grant appropriate relief on indemnity being given to the owner of a written obligation shown to have been lost or destroyed, the existence of such a jurisdiction has been affirmed in Savannah National Bank v. Haskins, 101 Mass. 370; Galveston City Co. v. Sibley, 56 Tex. 269, and in other cases. The question before us is as to the extent to which such a court will grant relief in the case of a loss of an instrument of the peculiar nature of a stock certificate.

What, then, is a stock certificate? It is a solemn and continuing affirmation by the corporation that the person to whom it was issued is entitled to all the rights and subject to all the liabilities of a stockholder in the company in respect of the number of shares named, and that the company will respect his rights, and the rights of any one to whom he may transfer such shares, by refusing to admit any new transferee to the rights of a shareholder except upon surrendering of the certificate. While it is not in a strict sense a negotiable instrument, yet it partakes to a great extent of the qualities of a negotiable security. Upon being indorsed by the original holder therein named, by signing a blank power of attorney, authorizing the person therein named to cause it to be transferred on the books of the corporation, it passes from hand to hand by delivery, very much as does a negotiable bond. When it falls into the hands of one who buys not for speculation but for investment and who wishes to be admitted to the rights of a stockholder, he inserts a name in the blank power of attorney, and the person so empowered demands of the corporation the right to transfer it on the books of the company to the present holder. If this demand is refused the holder has two remedies: 1. An action against the corporation for damages for the conversion of his shares. McAllister v. Huhn, 96 U. S. 87; (affirming s. c., 1 Utah 275); Bank v. Lanier, 11 Wall. U. S. 369; Holbrook v. New Jersey Zinc Co., 57 N. Y. 616; Payne v.

Elliott, 54 Cal. 339; S. C., 35 Am. Rep. 80; Ayres v. French, 14 Conn. 151; Boylan v. Hueget, 8 Nev. 345; Bond v. Mt. Hope Iron Co., 99 Mass. 505; Freeman v. Harwood, 49 Me. 195; Baltimore & C. R. Co. v. Stilwell, 35 Md. 238; S. C., 6 Am. Rep. 402; Bratt v. Boston, etc. R. Co., 126 Mass. 443. 2. A suit in equity to compel the corporation to issue a new certificate to him and to admit him to the rights of a shareholder. Cushman v. Thayer Man. Co., 76 N. Y. 365; S. C., 32 Am. Rep. 315; Iron R. Co. v. Fink, 41 Ohio St. 321; Chew v. Bank of Baltimore, 14 Md. 299; St. Romes v. Cotton Compress Co., 127 U. S. 614; Telegraph Co. v. Davenport, 97 U. S. 369.

Both of these remedies necessarily proceed on the ground that the holder of the certificate is entitled to be admitted by the corporation to the rights of a shareholder and that the corporation denies this right. The second remedy also proceeds upon the well known principle that, in the eye of a court of equity, a corporation is a trustee for its shareholder for the purpose of protecting their rights as such.

Let us next inquire with special reference to the facts of this case, what is the liability of the corporation where it issues a certificate of stock which by its terms is transferable only on the books of the company, and then on the representation of the person to whom it was originally issued that it has been lost or destroyed, issues to him another certificate, and he negotiates the latter to an innocent taker. It incurs the risk of a double liability in respect of the same shares. There are two adjudications on this point. In Greenleaf v. Luddington, 15 Wis. 558, the holder of a stock certificate assigned it, and then presented to the company an affidavit that he had lost it and gave bond of indemnity and procured from the company a new negotiable one. Thereafter the holder of the original certificate demanded of the company a transfer of the title on its books to him, which the company refused. It was held that he could maintain an action against the company for damages. So, in Cleveland & C. R. Co. v. Robbins, 35 Ohio St. 483, certain shares were transferred by the person named in the certificate to a *bona fide* purchaser in the usual way of signing the blank power of attorney indorsed on the certificate; afterwards the company issued to a third party new certificates ,on the supposition that the originals had been lost by the original holder. It was held that it must make good the damages to the *bona fide* transferee.

These cases, in what they hold, are consistent with the theory advanced by the court of appeals of New York in the celebrated Schuyler fraud cases, and no doubt held by their courts that in the case of an attempted double transfer of the same shares the *bona fide* taker to whom they are first transferred on the books of the company in the regular way gets the title and is the shareholder, in the second of these cases it was said by Davis J.: "Where the stock of a corporation is by the terms of its charter or by-laws, transferable only on its books, the purchaser who receives a certificate with power of attorney gets the entire title, legal and equitable, as between himself and his seller, with all the rights the latter possessed: but as between himself and the corporation he acquires only an equitable title, which they are bound to recognize and permit to be ripened into a legal title, when he presents himself, before any effective transfer on the books has been made, to do the acts required by the charter or by-laws in order to make a transfer. Until those acts be done, he is not a stockholder and has no claim to act as such; but he possesses as between himself and the corporation, by virtue of the certificate and power, the right to make himself, or whomsoever he chooses a stockholder by the prescribed transfer. The stock not having passed by the delivery of the certificate and power of attorney, the legal title remains in the seller so far as affects the company and subsequent *bona fide* purchasers who take by transfer duly made on the books. And hence a buyer on good faith of the person in whose name the stock stands on the books, who takes a transfer in conformity to the charter or by-laws permitted to be made by the authorized officer of the corporation becomes vested with a complete title to the stock, and cuts off all the rights and equities of the holder of the certificate to the stock itself. What other rights and equities he may possess, is another question; but if the transferee has taken in good faith and for value, the stock has gone beyond his reach and beyond recall by the corporation. The non-production and surrender of the certificate at the time of the transfer, is not fatal to the title of the transferee. It is only essential to the safety of the corporation, and may be waived by it, at its own peril. The company has the means of knowing whether a certificate of particular stock is outstanding or not, and the power to compel its return and cancellation, before any transfer is made; and a buyer, where the transfer is permitted by the corporation to be made on its books, by one to whose credit the stock is standing, has a right to presume that no certificate has issued, or if one has, that his vendor has duly surrendered it for cancellation."

This reasoning contains the further suggestion that, to compel a corporation to issue a second original certificate in the place of the one alleged to have been lost might put it in the hands of third persons to prejudice the rights of the public by imposing upon them as purchasers one or the other of those certificates. Both cannot be good. The certificate is only the symbol, it is not the stock. There may be two certificates in respect of the same shares but there can not be two sets of the same shares held in full ownership by two different persons, or by one person. If one certificate is good so as to confer the rights of a shareholder upon its owner, the other is void, except as giving an action for damages against the corporation. This is obvious when it is considered that the shares of the corporation can

only be increased in the manner pointed out by its charter or governing statute, and not by the misprisions of its ministerial officers. Upon this ground it has been held that if all the shares which the company is empowered to issue have been issued, and if other shares are thereafter issued, such excessive issue of shares is void, and does not even make their holders liable to creditors of the company. Scoville v. Thayer, 105 U. S. 143, 148, and cases cited. If, then, a corporation can be compelled on proof satisfactory to a court of equity and a bond of indemnity being given, to issue other original certificates in place of certificates claimed to have been lost, it may place in the hands of third parties the means of defrauding the public by conveying to them certificates of shares which do not give to them the rights of shareholders but which only give to them the right to maintain a lawsuit against the company.

It is not necessary for the purpose of this decision for us to express an opinion as to which of the certificates the holders in such a case would be entitled to the rights of stockholders as against the company. That question could only properly arise for determination in the contingency named, and we ought not to express an opinion upon it in this case, especially as no parties directly interested in determining it are before the court. It is sufficient for the purposes of this case for us to say that there are opposing theories on the subject. The New York doctrine, as shown by the language above quoted, is that the one whose transfer is first regularly made on the books of the corporation is the real stockholder. But on the other hand the Supreme Court of Illinois has held in Hall v. Rose Hill Road Co., 70 Ill. 673, that if the secretary of a corporation issues new certificates of stock to one claiming to have purchased existing shares therein, without taking up and cancelling the original, the new certificates will be invalid. Under this theory it is possible (though we do not so decide), that if relief were granted in this case, as demanded by the plaintiff, a *bona fide* purchaser of the new certificates, would get no rights as a shareholder, but only an action for damages against the corporation. Assuming that such a result is possible, it follows that any person to whom a certificate of corporate stock is offered for sale which has been issued in lieu of another certificate still outstanding has a right to know that fact. Upon what principle then shall a court of equity oblige a corporation to issue, in such a case as this, a new certificate concealing that fact? The concealment of such a fact by the holder from a purchaser might be such a fraudulent concealment as would avoid the sale. Can a court of equity make itself a party to such a fraudulent concealment?

It may be conceded for the purpose of this case, that where certificates of stock pass out of the hands of the original owner by theft, fraud or even by accident without negligence, a *bona fide* transferee into whose hands they may subsequently come, will get no title which he can assert against the true owner, and none which he can oblige the corporation to recognize. Biddle v. Bayard, 13 Pa. St. 150; Sherwood v. Meadow Valley Co., 50 Cal. 412. But where he signs a blank indorsement of transfer, with an irrevocable power of attorney, on the back of the certificate, and delivered it so signed to a third person, he not only voluntarily puts such third person in possession of the usual symbol of his property, but he also confers on him evidence of title, so that he may pass a good title to others as against the original owner, to an innocent purchaser, although he has, in making the transfer to the innocent purchaser, proceeded in fraud of the original owner and exceeded the authority actually conferred. McNeal v. Tenth National Bank, 46 N. Y. 325; s. c., 7 Am. Rep. 341; Merchants' Bank v. Livingston, 74 N. Y. 226; Mt. Holly & C. Co. v. Ferree, 17 N. J. Eq. 117; Walker v. Detroit & C. R. Co., 47 Mich. 338. Assuming the soundness of these decisions, it follows that in this case, the plaintiff having voluntarily delivered the certificates to the bank cashier, indorsed in blank, as the cashier thinks, if the latter transfer them to a third person for safe keeping and that third person wrongfully transfer them to an innocent taker, the plaintiff could not assert a title to them as against an innocent taker if he could not assert a title to them as against an innocent purchaser, it would be on the ground that he had parted with his title to the latter; and if he had parted with his title to the latter, it is not easy to see how he could subsequently transfer a good title to another by means of a new certificate issued by the corporation.

But as against the corporation the rights of the second purchaser he being an innocent purchaser, would be at least such that he could maintain an action against the corporation for damages for refusing to transfer the shares to him on its books —and this wholly without reference to the rights of the preceding purchaser as against the corporation. This was ruled by the Supreme Court of the United States in Bank v. Lanier, 11 Wall. 369, 377, where certain *bona fide* purchasers of national bank shares sued the bank for damages for refusing to transfer the shares to them on their books. Mr. Justice Davis, in giving the opinion of the court said: "The power to transfer their stock is one of the most valuable franchises conferred by congress upon banking associations without this power, it can readily be seen the value of the stock would be greatly lessened; and obviously, whatever contributes to make the shares of stock a safe mode investment, and easily convertible, tends to enhance their value. It is no less to the interest of the shareholder than the public, that the certificate representing his stock should be in a form to secure public confidence, for without this he could not negotiate it to any

advantage. It is in obedience to this requirement, that stock certificates of all kinds have been constructed in a way to invite the confidence of business men, so that they have become the basis of commercial transactions in all the large cities of the country, and are sold in open market the same as other securities. Although neither in form nor character negotiable paper, they approximate to it as nearly as practicable. If we assume that the certificates in question are not different from those in general use by corporation (and the assumption is a safe one) it is easy to see why investments of this character are sought after and relied upon. No better form could be adopted to assure the purchaser that he can buy with safety. He is told under the seal of the corporation, that the shareholder is entitled to so much stock, which can be transferred on the books of the corporation in person or by attorney, when the certificates are surrendered, but not otherwise. This is a notification to all persons interested to know, that whoever in good faith buys the stock, and produces to the corporation the certificates, regularly assigned with power to transfer is entitled to have the stock transferred to him. And the notification goes further, for it assures the holder that the corporation will not transfer the stock to any one not in possession of the certificates."

Without pursuing this line of inquiry further, we are clear that the company cannot be involved in the double liability which might follow from having two original certificates for the same shares outstanding, in the absence of any statute, by-law or conventional obligation putting such a liability on it, by the mere fact that one of its shareholders has, through his fault or misfortune, lost his original certificate, although suitable indemnity is given. If a second certificate conveying no information on its face that it is a duplicate, is issued and is negotiated to an innocent taker, it may find itself under a double liability in respect of the same shares. It may find that it has issued and received pay for one hundred shares, and that it is liable in respect of two hundred. By this act it may impair the value of the shares of every other stockholder in the company. Besides if it can be required to do this in favor of one shareholder who has been so careless or unfortunate as to have lost his certificates it may be required to so do for all. In this way it may incur double liabilities which may not mature for years, in respect of the same shares, against which it holds bond of indemnity which may be good to-day and worthless to-morrow. Suppose that the new certificates have been negotiated to innocent takers and in the meantime the bond of indemnity has become worthless, by what means can the corporation proceed to get a new and sufficient bond?

These suggestions show the difficulty in the way of granting the relief claimed by the plaintiff in this case; and the same difficulties have presented themselves to other courts. It was felt in a case already cited (Savannah National Bank v. Haskins, 101 Mass. 370) where it was held by a majority of the court that a suit in equity could be maintained for relief by one who had by accident lost a negotiable bill of exchange where the death of the drawer rendered it impossible to procure a new one, provided suitable indemnity should be given. The question arose on a demurrer to the bill, and the court did not feel called upon to decide at that stage of the case whether proper indemnity should be given "where it is in the power of the court to secure the defendant from all appreciable injury."

The same difficulty was felt by the Supreme Court of Texas, in the case of Galveston City Company v. Sibley, 56 Tex. 269, which was a suit in equity to procure relief analogous to that demanded in the case before us. The court refused to require the company to issue a new certificate in the place of the one alleged to have been lost, but did establish the rights of the plaintiffs as stockholders by its decree, upon their giving a good bond of indemnity and providing, among other things, "that this decree, or a certified copy thereof, is and shall be held as evidence of the right, title and interest of the plaintiffs in and to said stock," etc. The court said: "To require that the defendant company in the present case should substitute the alleged lost certificate of stock, assignable by transfer accompanying it, without being required to be upon the books of the company by a new certificate not divisible on its face, would be to admit that the company is not under either a legal or a moral obligation to perform. This, in the event the original certificate was not in fact lost, might force the company to recognize and pay a share of stock not voluntarily issued by them, and which would to that extent lessen the value of those previously issued. And besides, in the event the number of shares authorized by the charter had already been issued, then under the guise of judicial authority, the company might be compelled to do an unauthorized act and one *ultra vires*."

The same difficulty was felt by the Court of Appeals of Maryland, in Chesapeake, etc. Canal Co. v. Blair, 45 Md. 102, where the instrument lost was a negotiable coupon bond which had several years to run, and where the court granted relief in the form of a decree requiring the company to issue non-negotiable certificates in the place of the lost bond.

The only case which we have been able to find where the relief prayed for in this case was granted, is the case of Phillips v. New Orleans Gas-light Co., 25 La. Ann. 413. In this case there was a by-law providing for the issuing of new certificates in place of lost ones. We observe that the court also authorized this to be done without indemnity, taking the view that the holder of the certificate supposed to be lost (if it should prove to be destroyed) would have no rights against the company. This may be the

law of Louisiana, but it is not the general American law, nor is it our law.

We are therefore of opinion that the decree of the circuit court must be reversed. We think that the most that can be required of the defendant is to issue to the plaintiff duplicate certificates in lieu of the ones which have been lost. We are also of opinion that if this is all that is required of the company, a bond of indemnity in the sum of $1,000, signed by two solvent sureties, will be sufficient. We direct the circuit court, if the plaintiff shall so move, to enter a decree requiring the defendant, on the plaintiff giving to it such a bond, to issue to him stock certificates in lieu of those which have been lost, and bearing the same numbers, but containing the word "duplicate" written in red ink or conspicuously printed across the face; and also the following words: "Issued in pursuance of the decree of the circuit court of the city of St. Louis, State of Missouri, in the case of Henry Keller v. Eureka Brick Machine Co., being case numbered 812,63, on the docket of that court, in lieu of other certificates found by the court to have been accidentally lost and not negotiated by said Keller." It is so ordered. Judge Rombauer concurs. Judge Biggs dissents.

NOTE.—The fact that the court, in the principal case, was not able to discover a reported case which is exactly in point with the case before them, and the great scarcity of cases on the general subject of the jurisdiction of equity in case of lost certificates of stock, together with the growing interests in subjects of that character, tends to make it of special interest and value.

Equity, undoubtedly, has jurisdiction to decree the re-execution of such instruments as deeds which have become accidentally lost or destroyed. Huspeth v. Thomason, 46 Ala. 470; Griffin v. Fries, 23 Fla. 173; Tuttle v. Raney, 98 N. Car. 513. The jurisdiction is maintained in such cases, where the loss or destruction would create a defect in the deraignment of the plaintiff's title, and thus embarrass the assertion of his rights to the property. Cummings v. Coe, 10 Cal. 529. Though it was said in one case, that there was no principle in equity jurisprudence by which a grantor can be required to execute a second deed, where one previously executed has been lost or destroyed while in the possession of the grantee. Hoddy v. Hoard, 2 Ind. 474. It was there laid down that, though courts of equity will establish the possession of a party who claims title under a deed which has been lost or destroyed, or grants such other relief as the particular circumstances of the case may require, yet that this ought not to be done at the expense of him who executed the lost instrument, for he is under no obligation to preserve the evidences of the grantee's title, or to furnish a new deed if the deed originally delivered to him should be lost. It has also been laid down that equity will, under ordinary circumstances, decree the making of a new mortgage deed upon proof of the loss of the original without having been recorded. This may be the only adequate remedy, and without it the mortgagee may be exposed to the total loss of his security. Lawrence v. Lawrence, 42 N. H. 109. It was held that equity has no jurisdiction to supply or establish the records of a court of law, which have been accidentally lost or destroyed. Keen v. Jordan, 13 Fla. 327. Nor the records of a justice's court. Klingman v. Hopke, 78 Ill. 172.

So it has been repeatedly held that courts of equity have jurisdiction of actions brought to recover amounts due on lost bonds and other instruments sealed or unsealed, but in most of such cases the courts would require, as a prerequisite of relief, a suitable bond of indemnity and an affidavit of loss; and could so mould their decrees and place the plaintiff on terms as to save the defendant from future liability and harm, powers which were not possessed by common-law courts. 1 Pomeroy Equity Jurisprudence, 51. But now, in most of the States, suits may be brought directly at common law upon lost bills, notes or bonds, the statute providing for suitable bonds to be given, a proceeding which, in the absence of statute, was only cognizable, of course, in equity courts.

As will be noticed, the court, in the present case, while not denying the jurisdiction of a court of equity to grant appropriate relief on indemnity being given to the owner of a written obligation shown to have been lost or destroyed, the existence of which jurisdiction having been affirmed in many cases, say that the question directly before them is, as to the extent to which such a court will grant relief in the case of a loss of an instrument of the peculiar nature of a stock certificate. The difficulties in the case are added to, by the fact that there are few authorities to be found upon the subject, and in part, owing to the conflicting theories of courts as to the nature of a stock certificate, or rather, as to the effect of possession, as clothing one with the powers, liabilities and incidents of a stockholder. The able dissenting opinion of Judge Biggs in the present case, which is, unfortunely, too long for publication in full, calls attention to what may be considered by some the serious flaw in the argument of the majority of the court. That argument proceeds mainly upon the hypothesis that a lost certificate of stock, transferable on the books of the company, in the hands of a *bona fide* purchaser for value, would, necessarily, and under all circumstances, entitle the holder to call upon the company for its transfer upon the books of the company; and that, therefore, the issue of an original certificate by the company would, necessarily, be *ultra vires*, and, therefore, not enforcible by a court of equity. The position of the court, in effect, is that a *bona fide* holder of a certificate of stock has always at command two remedies for the enforcement of his rights: First. An action against the corporation for damages for the conversion of his shares. Second. A suit in equity to compel the corporation to issue a new certificate to him, and to admit him to the rights of a shareholder. As Judge Biggs says, if the above theory is right, the issuance of new certificates to the plaintiff would be *ultra vires* of the corporation, and no court could rightly compel it to do so. But if the position of the court has any foundation in law at all, it must rest on the legal assumption that the transfer and delivery of a certificate of stock to a *bona fide* holder without more, constitutes such purchaser a stockholder in the corporation. And the conclusion would, necessarily, follow that when the corporation issues new certificates without requiring the surrender of the old ones, even though it be in obedience to an order of court, it amounts to a double issue of stock; that even though proof of the most convincing character be produced, that the originals have been lost, the issuance of duplicates only could be lawful, because it could not be certainly said that the certificates claimed to have been lost or destroyed were not outstanding in the hands of

a *bona fide* stockholder. This follows from the statement of the court that if a corporation refuses to recognize the holders of its certificates as stockholders, that in addition to the stockholders' right of action for damages, a court of equity would compel the corporation to issue a new certificate and admit him to all the rights of a stockholder. So that it will be seen that the contention is upon the question, whether the effect of a mere sale and delivery of a certificate of stock, transferable only on the books of the company, does or does not constitute the transferee a stockholder. It will not be denied by any that under such circumstances, as between the assignor and the assignee at least, the title of the stock passes. Nor is it denied that under such circumstances the transferee may have a right of damages against the company for refusal to transfer his stock. But it is denied that under the decisions cited by the court, the effect of such a sale and delivery is to make the transferee a stockholder with the absolute right to force the transfer upon the books of the company. Unless the authorities cited in the opinion of the court support the declaration that a court of equity will compel a corporation, under all circumstances, to recognize a *bona fide* holder of an uncancelled certificate as a stockholder, the defendant's plea of *ultra vires* is without any authority to support it. Judge Biggs reviews at length the cases involved, namely: Cushman v. Thayer Mfg. Co., 76 N. Y. 365; Iron Co. v. Fink, 41 Ohio St. 341; Chew v. Bank, 14 Md. 299, to show that they do not sustain the position of the court. He says that the most satisfactory exposition of the law is to be found in the case of New Haven Ry. Co. Schuyler, 34 N. Y. 30, quoted in the opinion of the court, and that it will be observed by reference thereto that when the by-laws provide that stock can only be transferred on the books of the company, a sale and delivery of a certificate do not constitute the transferee a stockholder; that as between him and the assignor the title passes, but before it can be said that he is a stockholder, he must present his certificate to the company and have the stock transferred on the books; that until this is done the assignee is subject to none of the liabilities of a stockholder, neither has he any of the rights of a stockholder until he has been recognized as such by the corporation; that if the assignee neglects to have the stock transferred to him, and the owner, as it appears from the books, has the corporation to issue a new certificate and make the transfer to a second *bona fide* purchaser, then the latter acquires the title to the stock, and the first purchaser has only a right of action for damages against the corporation for making the transfer without requiring the original certificates to be surrendered. Judge Biggs concludes that the defendant's plea of *ultra vires* is unsupported by the authorities, and must fall to the ground. Whenever a certificate of stock is lost or destroyed, and satisfactory evidence of the fact is produced, the corporation may re-issue the certificate without subjecting itself to the charge of issuing more stock than the charter authorizes. But in doing so, it asserts that the holder of the new certificate is the stockholder, and it incurs the risk of having to account in damages to some third party, to whom the original certificate had, in fact, been negotiated. Hence, in no case should the corporation issue, or be compelled to issue, new certificates, unless it is first reasonably indemnified by a good bond. The officers of a corporation, who act in a fiduciary capacity, would be justified in all such cases to refuse to act until the owner of the lost certificate has established, at his own expense, its loss, and his right to another by the decree of a court of competent jurisdiction. "There is no disagreement as to the right of a court of equity to assume jurisdiction in this case. The remedy, undoubtedly, is in equity and not at law. The matter of disagreement is the kind of decree and the form of the certificate to which the plaintiff is entitled. The plaintiff is entitled not only to a decree that his original certificates have been lost, but the court ought to go further and decide that as between him and the defendant he is, and must, be regarded as the absolute owner of the stock. It is only in this way that its market value can be maintained. Anything short of it would discredit the plaintiff's title and prevent him from selling in the market. In this case the plaintiff has asked for bread and we have given him a stone. The opinion with the emasculated certificate, which is proposed to be issued, will deter any prudent business man from buying the stock. It may be true, as stated in the opinion, that the only direct precedent for the issuance of a new certificate is the case of Phillips v. New Orleans Gas Light Co., 25 La Ann. 413, but all the analogies of law support the case. Almost every day the courts of this State render judgments upon lost notes, and the only protection offered the makers is the statute requiring suitable bonds to be given. The makers must pay the judgments and take the risk of the bondsmen becoming insolvent. Our statute but follows the equity practice which prevailed prior to its enactment. Before the statute an action at law could not be maintained on a lost note. The owner's remedy was in a court of equity, where a recovery was permitted, provided reasonable indemnity was given. Eans v. Bank, 79 Mo. 182. It is upon the same equity principle that the plaintiff ought to be fully restored to all that he has lost."

While not assuming to take a pronounced position upon either side of this controversy, wherein both have presented the question so exhaustively and so ably, it is impossible not to be impressed with the plausible argument made by the dissenting judge. If the theory advanced by him, as to the effect of a stock certificate under the circumstances of this case in the hands of a *bona fide* holder, is correct, the result necessarily follows that the court was wrong in refusing to decree a new certificate upon the ground of inability to compel a corporation to do an *ultra vires* act, and so far as any right of damages which such a holder would have against the company, the bond proposed would sufficiently indemnify the company. When we look at the facts of this case and consider that there is at least an even chance that the stock in question was not indorsed in blank, and that the possibility of its negotiation is very remote, it would seem equitable at least to grant to the plaintiff a certificate which would be of marketable value to him. As it is, under the decision of the court, he is absolutely without substantial redress, and while he is still a stockholder in the company, and may always remain so, he has no evidence of title thereto which is susceptible of effective transfer.

LYNE S. METCALFE, JR.

HUMORS OF THE LAW.

"GENTLEMEN of the jury," said a Minnesota judge, "murder is where a man is murderously killed. The killer in such a case is a murderer. Now, murder by poison is just as much murder as murder with a gun, pistol or knife. It is the simple act of murdering that constitutes murder in the eye of the law. Don't let the idea of murder and manslaughter confound you. Murder is one thing, manslaughter is quite another.

Consequently, if there has been a murder, and it is not manslaughter, then it must be murder. Don't let this point escape you. Self-murder has nothing to do with this case. According to Blackstone, and all the best living writers, one man cannot commit *felo-de-se* upon another, and that is clearly my view. Gentlemen, murder is murder. The murder of a brother is called fratricide, and the murder of a father is called parricide; but that don't enter into this case. This case is murder; and as I said before, murder is most emphatically murder. You will take the case, gentlemen, and make up your minds according to the law and evidence, not forgetting the explanation I have given you."

One would imagine it impossible to beat the above as a sample of non-lucidity: but it is run pretty close by the following specimen from Georgia. Smith sued Jones upon a promissory note given for a horse. Jones pleaded failure of consideration, avowing that the horse had the glanders, of which he died, at the time of the sale, and that Smith knew it. Smith replied that the horse did not have the glanders, but the distemper, and that Jones knew it when he bought the animal. This is how the judge charged the jury:

"Gentlemen of the jury, you have already made one mistrial of this case because you did not pay attention to the charge of the court, and I don't want you to do it again. I intend to make it so clear to you this time that you cannot possibly make any mistake. This suit is for a note given for a promissory horse. I hope you understand that. Now, if you find that at the time of the sale Smith had the glanders, and Jones knew it, Jones cannot recover. I will state it again. If you find that at the time of the sale Jones had the distemper, and Smith knew it, then Smith cannot possibly recover. But, gentlemen, I will state it a third time, so that you cannot possibly make a mistake. If at the time of the sale Smith had the glanders and Jones had the distemper, and the horse knew it, then neither Smith, Jones nor the horse can recover. Let the record be given to the jury."

The gentlemen who had to make their verdict square with that judicial exposition would have gladly changed places with the twelve good men and true who heard an Arkansas judge, in response to a request that he would charge the jury, say, "I will with pleasure. The court charges each juryman one dollar for drinks, and six dollars extra for the one who used the court's hat for a spittoon during the first day of the session."

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ACCOUNT—Evidence.— Plaintiff's account may be proved by the testimony of his agent, that defendant, when presented with it, admitted its correctness. — *Rjorkquest v. Wagar*, Mich., 47 N. W. Rep. 235.

2. ACTION FOR BENEFIT OF ANOTHER—Ratification.— Where one has brought an action in the name of another as suing for his use, without first obtaining the consent of the plaintiff, in whom is the legal title to the cause of action, the latter may ratify at any time while the action is pending, and such ratification will relate back to the commencement. — *Bowe v. Gress Lumber Co.*, Ga., 12 S. E. Rep. 177.

3. ADVERSE POSSESSION. — The owner of a large lot with a dwelling on one side of it conveyed the part on which the house stood to his wife, and afterwards she secured a divorce. The other part was sold for taxes, and bought by his daughter, who received a tax-deed therefor. Both lots remained within the same inclosure, and the daughter lived in the house with the divorced wife, and continuously claimed and exercised rights of ownership over the vacant lot; *Held*, that the daughter had adverse possession. — *Gately v. Weldon*, Ky., 14 S. W. Rep. 680.

4. ADVERSE POSSESSION — Railroad Right of Way.— Where a railroad company, after condemning a right of way and grading its road-bed, abandons the work, and exercises no acts of ownership for over 10 years, the question whether an adjoining land-owner acquired title to such right of way by adverse possession depends on whether he took exclusive possession, claiming it as his own, and whether he and his grantees so held it continuously for a period of 10 years thereafter, and before the railroad company again began to exercise control over it.—*Brown v. Chicago, etc. Ry. Co.*, Mo., 14 S. W. Rep. 719.

5. ANIMALS—Vicious.—The owner is not liable for an injury inflicted by a domestic animal, allowed unlawfully to roam at large, in the absence of notice that it possessed a vicious disposition. — *Kienberg v. Russell*, Ind., 25 N. E. Rep. 596.

6. APPEAL—Matters not Apparent of Record.— Where an order granting a motion for new trial does not state the ground on which it is based, but is unqualified, the fact that it was based on a misapprehension of the law cannot be made to appear on appeal by bill of exceptions stating, as the only reason for granting the order, a ground not mentioned in the motion.—*Warner v. Michelstetter*, Wis., 47 N. W. Rep. 181.

7. ASSIGNMENT— Chattel Mortgage. — Where the general creditors of an insolvent, whose claims have been allowed by the assignee in a voluntary assignment, are admitted to defend, on behalf of the assignee, a suit for the foreclosure of a prior chattel mortgage on his stock in trade, they cannot contest the validity of the mortgage on the ground of its being a conveyance to the use of the mortgagor; as such mortgage is valid as to the mortgagor, and the subject-matter of the assignment was only his remaining interest in the estate after satisfaction of the mortgage. — *Jacobi v. Jacobi*, Mo., 14 S. W. Rep. 736.

8. ASSIGNMENT FOR BENEFIT OF CREDITORS — Conversion. — The fact that an assignee for the benefit of creditors took no title to his assignor's property because of his failure to file his bond, as required by How.

St. Mich. § 8739, will not prevent the assignee, in an action of trover for the conversion of the assignor's property, brought against him by a chattel mortgagee of the assignor, from setting up the defense that the mortgage was fraudulent. — *Abbott v. Chaffee*, Mich., 47 N. W. Rep. 216.

9. ASSIGNMENT FOR BENEFIT OF CREDITORS — Judgment by Confession. — The execution by an insolvent debtor, at the demand of some of his creditors, of judgment notes for an amount less than one third of the value of his property at forced sale does not constitute an assignment for the benefit of creditors. — *Burch v. West*, Ill., 25 N. E. Rep. 658.

10. BOND—Breach.—Where, in an action to recover possession of realty against one as a tenant holding over, defendant files a counter-affidavit and gives bond conditioned to pay plaintiff whatever sum, with costs, he may recover in the suit, a judgment dismissing defendant's affidavit for defects therein, where there was no recovery of a money judgment, even for costs, gives plaintiff no right of action on the bond. — *Clark v. Lee*, Ga., 12 S. E. Rep. 184.

11. BOUNDARIES—Highway.— Where a conveyance, or a bond to convey, designates a public highway as one of the boundaries of the tract, the instrument will generally be construed as comprehending the highway itself to the center or middle thread.—*Silvey v. McCool*, Ga., 12 S. E. Rep. 175.

12. BURGLARY—Evidence—Variance—Appeal.—Where an indictment for burglary and larceny describes the dwelling entered and the goods stolen as the property of a wife, and the proof shows that the dwelling was owned by her husband, and the goods by her daughter, the variance does not work an acquittal, unless the court finds that it was material and prejudicial to defendant.—*State v. Nelson*, Mo., 14 S. W. Rep. 718.

13. CARRIERS—Injury to Postal Clerk.— A government postal clerk, riding on a train by virtue of a contract between the railroad and the federal government touching the carriage and care of United States mail, is a passenger, so far as the duty of the railroad to carry him safely is concerned. — *Mellor v. Missouri Pac. Ry. Co.*, Mo., 14 S. W. Rep. 758.

14. CARRIERS OF PASSENGERS—Injury to Minor. — The fact that a passenger is evidently very young is a circumstance that must be taken into consideration by a carrier in the discharge of its duty to stop the car a sufficient length of time to give the passenger reasonable opportunity to alight in safety. — *Ridenhour v. Kansas City, etc. Ry. Co.*, Mo., 14 S. W. Rep. 760.

15. CARRIERS OF PASSENGERS — Negligence. — In an action by a passenger for an internal injury sustained in railroad wreck, where defendant contended that the injury was feigned, and was an after-thought, the testimony of one who was present that some 15 minutes after the accident plaintiff complained of feeling strangely in his stomach and bowels, and expressed a fear that he was hurt, was admissible, when the injury was of a nature to produce the symptoms then complained of. — *Texas, etc. Ry. Co. v. Barron*, Tex., 14 S. W. Rep. 688.

16. CHATTEL MORTGAGES.— Plaintiff gave his creditor an instrument which recited that he sold certain ties to the latter to secure payment of a debt, and provided that either party might sell the ties at a stipulated price or more, and that out of the proceeds the amount of the debt should be paid to the creditor, and the balance to plaintiff: *Held*, that the creditor had power to sell for cash only, and that a purchaser from him could not set off accounts held by such purchaser against plaintiff, against the latter's share of the price. — *Halpin v. Stone*, Wis., 47 N. W. Rep. 177.

17. CONDEMNATION PROCEEDINGS. — Under the provision of the charter of the city of Muskegon, that, in proceedings to condemn land for public improvements, notice of the application to impanel a jury shall be given "by publishing the same for three weeks in one of the newspapers of said city, the first publication of which shall be at least thirty days before the time fixed for the application" there must be 30 full days between the first day of publication and the day of application. —*Rifenburg v. City of Muskegon*, Mich., 47 N. W. Rep. 231.

18. CONSTITUTIONAL LAW— Police Power—Dogs.—Pub. Acts Mich. 1889, No. 214, which provides that all moneys collected in cities as a license tax on dogs, shall be turned over to the county treasurer, to be kept as a special fund for the payment of losses suffered by sheep-owners from the killing or wounding of sheep by dogs kept in such cities, is a valid exercise of the police power of the State. — *Longyear v. Buck*, Mich., 47 N. W. Rep. 284.

19. CONSTITUTIONAL LAW— Quo Warranto.—Under the constitution the St. Louis and Kansas City courts of appeals have no jurisdiction to issue writs of *quo warranto* in cases involving the title to any office in the State.—*State v. Rombauer*, Mo., 14 S. W. Rep. 726.

20. CONSTITUTIONAL LAW—Taxation of Banks. — That part of § 2759 of the Revised Statutes, regulating returns for taxation of unincorporated banks and bankers, which provides that from the aggregate sum of the first five items therein enumerated the county auditor shall deduct the aggregate sum of the fifth, sixth, seventh, and such portions of the eighth items as are by law exempt from taxation, is not repugnant to either § 2, or § 3 of article 12 of the constitution, except to the extent of including the entire third item among those from which the deduction is to be made.— *Treasurer of Fayette County v. People's, etc. Bank*, Ohio, 25 N. E. Rep. 697.

21. CONSTITUTIONAL LAW—Taxation of Corporations. —Rev. St. Ill. 1889, ch. 120, § 3, which provides that the capital stock of certain classes of corporations shall be assessed by the State board of equalization and of other corporations by the local assessors, is not in conflict with Const. Ill. art. 9, § 1, which empowers the legislature to tax "persons or corporations owning or using franchises or privileges in such manner as it shall direct by general law, uniform as to the class upon which it operates." —*Sterling Gas Co. v. Higby*, Ill., 25 N. E. Rep. 660.

22. CONTRACT—Consideration.— A promise by a building contractor to put another coat of oil on the inside of a house, made after he had fully complied with his contract, and without any additional consideration, is a mere gratuity; and his failure to put on the additional coat will not preclude him from recovering the full amount due under the contract. — *Widiman v. Brown*, Mich., 47 N. W. Rep. 231.

23. CONTRACT—Construction.— It is only where there is doubt as to the meaning of the terms in a written contract or the writing is silent or incomplete as to a given point, that the court in interpreting the contract will resort to a practical construction which the parties may have put upon it.—*St. Paul, etc. R. Co. v. Blackmar*, Minn., 47 N. W. Rep. 172.

24. CONTRACT—Construction.—Plaintiff contracted to construct a building for defendant according to the plan and specifications which were made a part of the contract. Moreover, the contract expressly stipulated that plaintiff should not vary in any manner from the plan and specifications without the written consent of defendant: *Held*, in an action for breach of contract, that the contract having called for a particular kind and make of columns, and it appearing that they could have been procured, evidence that the columns substituted for them were substantially like them was immaterial and irrelevant.—*Linch v. Paris Lumber & Grain Co.*, Tex., 14 S. W. Rep. 701.

25. CONTRACT—Construction.—Under the facts of this case, *held* that the selection of plaintiff's designs as an architect was conditional only, and did not entitle him to be employed as an architect of the building, and that there was evidence that he had waived the right to have a selection made in accordance with the terms on which the competition was invited.—*Walsh v. St. Louis Exposition and Music Hall Ass'n.*, Mo., 14 S. W. Rep. 722.

26. CONTRACT—Guaranty.—A guaranty that certain work, to be done according to specifications and the directions of an engineer, will remain in good condition for a year, is broken if the work fails to remain in good condition for a year, even though the failure was not caused by defective material or workmanship.—*City of Lake View v. MacRitchie*, Ill., 25 N. E. Rep. 663.

27. CONTRACT—Interpretation.—An insolvent debtor executed and caused to be recorded a bill of sale to certain creditors of all his cattle, specifically described by brands, etc. At the same time another instrument was executed by the parties, reciting that, in order to discharge a debt due the creditors, and other debts which they assumed, the debtor contracted to collect from his herds and deliver sufficient cattle, at a fixed value per head, to discharge the debt, and the creditors agreed to make a return bill of sale for any cattle remaining after the debt was so discharged: *Held*, that the two instruments must be construed together, and that they show that title did not pass.—*Dallas Nat. Bank v. Davis*, Tex., 14 S. W. Rep. 706.

28. CORONER'S INQUEST—Liability for Expenses.—Rev. St. Mo. § 5154, which provides that, if the person over whose body an inquest shall be held shall have any estate, "the costs and expenses of the inquest and burial" shall be paid out of the estate, does not impose the burden of paying the coroner's jurors', witnesses', and constables' fees on the estate of the deceased, but only the expenses incurred by the coroner in burying the dead body.—*Houts v. Prussing's Adm'r*, Mo., 14 S. W. Rep. 766.

29. CORPORATIONS—Liability of Stockholders.—Section 136, ch. 16, Comp. St., which makes stockholders in a corporation liable for debts contracted by the corporation while its officers are in default in publishing an annual notice stating "the amount of all its existing debts," is *quasi* penal only, but is not a penalty, the evident purpose being to secure the rights of creditors; and an action to recover such debts is not barred by the statute of limitations in one year.—*Coy v. Jones*, Neb., 47 N. W. Rep. 208.

30. CRIMINAL EVIDENCE—Dying Declarations.—In a trial for murder, declarations by the deceased that he did not want the accused prosecuted are not admissible for the defense, though made after the deceased had given up all hope of recovery.—*State v. Nelson*, Mo., 14 S. W. Rep. 712.

31. CRIMINAL EVIDENCE — Insanity — Opinion.—The witness not being an expert, his opinion that from the manner of the accused, and from all the circumstances surrounding the transaction, the accused acted under an insane delusion, and was impelled by an irresistible impulse, was not competent evidence.—*Patterson v. State*, Ga., 12 S. E. Rep. 174.

32. CRIMINAL LAW—Larceny.—In an indictment under Gen. St. Ky. ch. 29, art. 11, § 4, for stealing money of the value of $4, or upwards, from the person or possession of another, without violence or putting in fear, it is sufficient to charge the stealing of "money, currency of the realm, to the amount of $16," Crim. Code Ky. 1877, § 135, providing that, in an indictment for larceny of money, or United States currency, or bank-notes, it is sufficient to allege the larceny of the same without specifying the coin, number, denomination or kind.—*Commonwealth v. Mann*, Ky., 14 S. W. Rep. 685.

33. CRIMINAL PRACTICE—Breaking with Intent to Steal.—Gen. St. Ky. ch. 29, art. 6 § 4, denounces the offense of breaking and entering with intent to steal; and an indictment thereunder, charging that defendant broke and entered a certain store-house with intent to steal, and did steal certain goods therefrom, is not bad for duplicity, as charging the crime of larceny in addition to the statutory offense. The stealing charged will be considered merely as a statement of evidence of the felonious intent.—*Farris v. Commonwealth*, Ky., 14 S. W. Rep. 681.

34. CRIMINAL PRACTICE—Homicide.—Where on trial for murder the theory of the defense is not that defendant is innocent, but that the crime of manslaughter only was committed, the failure of the judge to clearly and accurately define that crime is harmless error, where there is a specific instruction that if the jury find the facts as attempted to be established by defendant's evidence, then defendant is guilty only of manslaughter.—*People v. Harper*, Mich., 47 N. W. Rep. 221.

35. CRIMINAL PRACTICE—Minutes of Grand Jury.—The uncertified minutes of the testimony of a witness taken down by the clerk of the grand jury, as provided by Rev. St. Mo. § 4075, who is not under oath to fully and correctly take down the evidence, are inadmissible on the trial in corroboration of the witness, whose testimony has been impeached by evidence of contradictory statements made before the trial.—*State v. Whelehon*, Mo., 14 S. W. Rep. 730.

36. DEED—Delivery.—Where a deed purporting to convey a present absolute estate is intended by the grantor to take effect at his death as a testamentary provision, and the deed is retained by him for some time after its execution, and then handed by him to the grantee, for the sole purpose of being placed with his other papers in a vault, such transfer of the deed does not constitute a valid delivery.—*Bovee v. Hinde*, Ill., 25 N. E. Rep. 694.

37. DEED TO HUSBAND AND WIFE.—Under How. St. Mich. §§ 5560, 5561, a deed to two persons who are in fact husband and wife creates in them a joint tenancy though the deed does not describe them as husband and wife.—*Dowling v. Sallsotte*, Mich., 47 N. W. Rep. 225.

39. DEPOSITIONS — Waiver of Irregularities.—The omission of the name of the court in a notice for the taking of a deposition, which omission could not have misled the party notified, should be taken advantage of by a motion to suppress the deposition, and not by an objection on the trial to the admission of the deposition as evidence.—*Bell v. Jamison*, Mo., 14 S. W. Rep. 714.

39. EJECTMENT—Complaint.—Under Rev. St. Wis. § 3077, requiring a complaint in ejectment to specify that plaintiff is entitled to the possession of the premises demanded, it must be averred that plaintiff is entitled to the possession at the commencement of the action, and an allegation that plaintiff was at an antecedent time entitled to the possession, and that defendant unlawfully withholds it, does not supply the place of the averment required.—*Methodist Episcopal Church of Ashland v. Northern Pac. R. Co.*, Wis., 47 N. W. Rep. 190.

40. ELECTIONS—Appointment of Supervisors.—The refusal of the managers of one political party to cooperate in a petition for the appointment of supervisors of election is no reason for denying the petition, where it appears that the petitioning party used due diligence to secure such co-operation.—*In re Supervisors of Election*, U. S. C. C. (Tex.), 43 Fed. Rep. 859.

41. ELECTION CONTEST—Illegal Voting.—In order to establish the fact that illegal votes were cast at an election in a specified voting precinct, proof must be offered by one or more witnesses having actual knowledge of such fact that persons who were not legal voters did actually vote at such election, and such witness or witnesses must designate such illegal votes.—*Todd v. Cass County*, Neb., 47 N. W. Rep. 196.

42. ELECTION CONTEST—Writs.—Under Rev. St. Ill. ch. 46, § 114, which provides that in election contests the contestee may be served with process, or notified to appear in the same manner as in cases in chancery, the summons in such a contest must be returnable to the first or second term after its date, as is required in chancery cases by chapter 22, § 9 *Id.*, and not to any term held within three months after its date, as is allowed in law actions by chapter 110, § 1, *Id.*—*Cavanaugh v. McConochie*, Ill., 25 N. E. Rep. 674.

43. EMINENT DOMAIN—Depot Companies.—Pub. Laws Mich. 1881, p. 320, as to union depot companies stamped the property taken with such a public character as to authorize the granting of the power of eminent domain

to the companies.—*Fort Street Union Depot Co. v. Morton*, Mich., 47 N. W. Rep. 228.

44. EQUITY—Boundaries.—A controversy between owners of adjoining tracts of land in regard to their boundary line, resulting in the tearing down of the fence and hauling away of timber by one of them, does not present a case for a court of equity, in the absence of a confusion of the boundary occasioned by fraud, or a relation between the parties making it the duty of one of them to preserve and protect the boundary, or the necessity of suit in equity to prevent a multiplicity of suits.—*Walker v. Leslie*, Ky., 14 S. W. Rep. 683.

45. EQUITY PRACTICE—Answer.—Under Rev. St. Ill. ch. 22, § 19, which allows a defendant who has not been served to answer the bill at any time within three years after final decree, on petitioning for leave to do so, it is reversible error to refuse defendant leave to answer after he has filed a petition showing that he comes within the purview of said statute, because the oral statements of his counsel show that he has no valid defense to the suit, where there is nothing to show that the defendant agreed that such oral statements should stand as an answer, Shope, J., dissenting.—*Trustees M. E. Church v. Field*, Ill., 25 N. E. Rep. 667.

46. EVIDENCE—RECORDS—The record in the office of the register of deeds of an attachment of real property, which attachment has been made in conformity with the provisions of sections 151 and 160, ch. 66, Gen. St. 1878, relating to the attachment of real property, is admissible in evidence, on the trial of an action involving the title to said property.—*Cousins v. Alworth*, Minn., 47 N. W. Rep. 169.

47. FEDERAL COURTS—Jurisdiction.—A district judge, when holding circuit court in another district by appointment of the circuit judge under Rev. St. U. S. §§ 591, 592, 596, could, by consent of the parties, hear and determine a writ of error in a criminal case from the district court.—*Harmon v. United States*, U. S. C. C. (Colo.), 43 Fed. Rep. 817.

48. FRAUDS, STATUTE OF—Guaranty.—A contract between the creditor of a corporation and some of its stockholders, whereby the latter agrees that if the creditor will return to the corporation certain notes held by it as collateral security to the note of the corporation, such notes shall be replaced with others, or the debt secured thereby be paid, is a contract of guaranty, and not an original undertaking to pay the debt of another.—*Home Nat. Bank v. Waterman's Estate*, Ill., 25 N. E. Rep. 648.

49. FRAUDS, STATUTE OF—Sale or Agency.—Defendant, a commercial broker, requested plaintiff, a retail grocer to include in his orders for canned goods a certain number of cases for defendant at a certain price, defendant agreeing to receive them on delivery, and pay for them at such price. Plaintiff having ordered them, defendant refused to receive and pay for them on delivery: *Held*, in an action for amount lost by plaintiff on account of the depreciation in value in said goods, that this was not a contract of bargain and sale, which had to be in writing, under the statute of frauds, but a contract of agency. — *Hatch v. McBrien*, Mich., 47 N. W. Rep. 214.

50. FRAUDULENT CONVEYANCES.— A conveyance absolute on its face but intended as a mortgage is constructively fraudulent as to creditors. — *Beidler v. Crane*, Ill., 25 N. E. Rep. 655.

51. FRAUDULENT CONVEYANCES. — Under Rev. St. Tex. 1879, art. 2465, declaring a conveyance intended to defraud creditors void as to them, and that "this article shall not effect the title of a purchaser for a valuable consideration, unless it appears that he had notice," the creditor to defeat the conveyance must show the fraudulent intent ; the purchaser must then show that he has paid value ; and this being shown, the burden again shifts, and the creditor, in order to prevail, must prove that, at the time of the payment, the purchaser had notice of the fraud. — *Tillman v. Heller*, Tex., 14 S. W. Rep. 700.

52. FRAUDULENT CONVEYANCES—Evidence. — On a bill to set aside a conveyance as in fraud of the grantor's creditors, it appeared that the grantor and grantee were brothers, and that the grantor left the county suddenly, after making the deed, and that he was then indebted to about the value of the land. Both grantor and grantee testified to the *bona fides* of the transaction, and that full value was paid and received for the land: *Held*, that the fraud was not substantiated by the evidence.—*Shotwell v. McElhenny*, Mo., 14 S. W. Rep. 754.

53. GUARDIAN AND WARD — Location of Land Certificate.—Under Act Tex. May 20, 1848, making it "the duty of every guardian of the estate of a minor to take care of and manage such estate in such manner as a prudent man would manage his own estate," a guardian could contract with a third person to locate a land certificate belonging to his ward in consideration of part of the land obtained. — *Wren v. Harris*, Tex., 14 S. W. Rep. 696.

54. HUSBAND AND WIFE— Liability of Wife. — Defendant, a married woman, living with her husband, obtained from plaintiff at his place of business a suit of clothes for her minor child. The court instructed that before finding for plaintiff the jury must be satisfied that defendant told plaintiff to charge the goods to her: *Held*, that this was equivalent to the instruction requested by defendant that the jury must first find that defendant told plaintiff to charge them to her individually.—*Hirshfield v. Waldron*, Mich., 47 N. W. Rep. 239.

55. INJUNCTION—Bond.— Where, on dismissal of a suit for injunction, a temporary injunction is continued in force pending an appeal, a bond conditioned that the appellant "shall duly prosecute said appeal, and shall, moreover, pay all damages, and damages growing out of the continuance of the injunction in case the said decree shall be affirmed," makes the sureties thereon liable, upon the decree being affirmed, for damages caused by the continuance of the injunction, though no such damages are awarded in the decree of affirmance, the appellate court having no jurisdiction on such appeal to award such damages.— *Shreffler v. Nadelhofer* Ill., 25 N. E. Rep. 630.

56. INJUNCTION—Electric Railway.—Injunction herein denied because no present injury to property was shown and the apprehended injury is too remote under all the circumstances.— *Potter v. Saginaw Union St. Ry. Co.*, Mich., 47 N. W. Rep. 217.

57. INJUNCTION — When Granted. — A preliminary injunction will not be granted to compel the lessees of an opera-house to allow the complainants use the house in accordance with a contract therefor, where such injunction would compel the lessees to break a similar contract made by them with an innocent third party, and the complainants cannot use the house with profit to themselves. — *Foster v. Ballenberg*, U. S. C. C. (Ohio), 43 Fed. Rep. 821.

58. INSURANCE—Pleading.— In an action on an insurance policy a complaint alleging that immediately after the fire plaintiff gave notice to defendant of the loss and that they have performed all the conditions of the policy sufficiently alleges that proofs of loss were forwarded to defendant within 60 days after the loss according to condition in the policy. — *Benedix v. German Ins. Co.*, Wis., 47 N. W. Rep. 176.

59. INTOXICATING LIQUOR— Sales after Legal Hours. — In an information against a person for keeping his saloon open after legal hours, contrary to the statute, it is not necessary to aver that the place kept open was not a drug-store, and that the accused is not a druggist, and it is not, therefore, error to permit at the trial an amendment to the information alleging these facts. — *People v. Sullivan*, Mich., 47 N. W. Rep. 220.

60. INTOXICATING LIQUOR — Village Ordinance. — The board of trustees of a village has authority to enact an ordinance to prohibit the sale of intoxicating liquors within the corporate limits, and to provide, as a penalty for its violation, the imposing of a fine not to exceed $100, and for imprisonment in default of the pay-

ment of the fine and costs. — *Bailey v. State*, Neb., 47 N. W. Rep. 208.

61. JUDGMENT — Fraud. — The rule that the fraud for which equity will vacate a judgment must be a fraudulent act in procuring it is not to be applied in all its strictness to a judgment based on service by publication against one who had no actual notice; but relief will be given in such case on proof that the judgment was entered on a cause of action known to be without foundation.—*Irvine v. Leyh*, Mo., 14 S. W. Rep. 715.

62. JUDGMENT — Voluntary Payment. — Money recovered and paid on legal process upon a judgment of a court of competent jurisdiction, rendered in a suit or proceeding in which the court had jurisdiction of the subject and the parties thereto, or voluntarily paid in satisfaction of the judgment or process, cannot be recovered back in a subsequent action, while such judgment remains in force unreversed and unmodified. — *Deseret Nat. Bank v. Nuckolls*, Neb., 47 N. W. Rep. 202.

63. LEASE—Assignment—Statute of Frauds. — The assignment of a lease whose unexpired term is longer than a year is within the purview of Rev. St. Ill. ch. 59, § 2, which provides that no action shall be brought "upon any contract for the sale of lands, tenements or hereditaments or any interest in them for a longer term than one year, unless such contract or some note or memorandum thereof be in writing." — *Chicago Attachment Co. v. Davis Sewing Machine Co.*, Ill., 25 N. E. Rep. 669.

64. LIBEL—Privileged Communication. — A letter assailing the character of a recently elected honorary member of a medical society, written to the secretary thereof by a delegate thereto, who was also a member, in the *bona fide* discharge of a duty imposed on him to inform the society of all matters and things relating to the medical profession which in his judgment seemed necessary to maintain the honor and dignity thereof, is a privileged communication.—*McKnight v. Hasbrouck*, R. I., 20 Atl. Rep. 95.

65. LIMITATION OF ACTIONS.—Under Rev. St. Mo. 1879, § 3229, limiting to 10 years "actions for relief not herein otherwise provided for," a suit to reform a trust-deed, inserting as part of the lands conveyed a tract omitted by mistake, is barred in 10 years from the execution of the deed though the lands were then, and long after, subject to a life-estate, the trust-deed purporting to convey the reversion only. — *Hoester v. Sammelmann*, Mo., 14 S. W. Rep. 728.

66. MALPRACTICE—Evidence. — In an action for malpractice, consisting in the alleged use of unnecessary force by defendant in reducing a fracture of plaintiff's thigh bone, whereby a ligament of her knee was ruptured, plaintiff may testify as to her symptoms, and her feeling as to the location of the pain in her knee, but not as to her conclusion that the pain was caused by the rupture of the ligament. — *Spaulding v. Bliss*, Mich., 47 N. W. Rep. 210.

67. MANDAMUS—Board of Canvassers.—*Mandamus* will issue to compel a board of city canvassers to issue certificates of election to those candidates for aldermen who are shown by a canvass of the returns of the precinct inspectors to have received the most votes, as the duty of such canvassers is merely clerical and not judicial. *Coll v. City Board of Canvassers*, Mich., 47 N. W. Rep. 227.

68. MANDAMUS — Improvement of Highways. — Town supervisors will not be required, by *mandamus*, to make a particular improvement upon a town highway, unless, at least, the duty to do so is so plain and imperative.— *State v. Board of Supervisors*, Minn., 47 N. W. Rep. 163.

69. MARRIED WOMAN—Rights of Husband.—Land held by a married woman under the Missouri married woman's act (Rev. St. 1879, § 3295), cannot be charged, affected, or conveyed, except by the joint deed of the husband and wife, and an executory contract to convey cannot be specifically enforced, though executed and acknowledged by her jointly with her husband, nor can a payment made thereunder be declared an equitable lien on the land.—*Gwin v. Smurr*, Mo., 14 S. W. Rep. 731.

70. MARRIED WOMAN—Specific Performance.— A petition alleged a contract by a wife and her husband for the conveyance of her land, and the payment of a certain amount on the contract. The prayer was for specific performance, and general relief: *Held*, that the prayer could not be construed as a prayer for a money judgment, under Rev. St. Mo. 1889, § 2039, and therefore a general demurrer to the petition was properly sustained.—*Rush v. Brown*, Mo., 14 S. W. Rep. 735.

71. MASTER AND SERVANT—Negligence.—Plaintiff, a 17-year-old boy working in defendants' machine shop, was ordered to stop the engine. To reach it, he intended to step over a rapidly revolving shaft at a point often used by defendants' other employees for that purpose. Before reaching that point, his pants were caught by a set-screw in the shaft, and his leg was crushed: *Held*, that the evidence justified the inference that plaintiff was going by the shaft, rather than over it, when injured; and that it was proper to instruct that if plaintiff, "without any negligence on his part," by reason of his youth or inexperience, or reliance on the directions given him, failed to appreciate the danger in passing "over or by" said shaft, and was injured in consequence, the defendants will be responsible for their negligence in not properly guarding the shaft.—*Dowling v. Allen*, Mo., 14 S. W. Rep 751.

72. MASTER AND SERVANT—Risks of Employment.—A servant who works near and around a stairway built for the use of employees, which is steep, narrow, without railing, and with steps at irregular distances, and which he has used, is chargeable with knowledge of the defects, as they are plainly obvious, and he assumes the risks of injury in using the stairway arising from such defects.—*Sweet v. Ohio Coal Co.*, Wis., 47 N. W. Rep. 182.

73. MECHANICS' LIENS—Judgment.—The rule that judgments only affect parties and privies applied in respects to judgments in actions to enforce mechanics' liens upon real property after the owner of the land incumbered by the liens had conveyed it to another, such grantee not being made a party to be actions, although his title appeared of record. His estate was not affected by such judgments, and the liens expired by statutory limitation, and ceased to incumber his property, after the lapse of two years from the time of their commencement.—*Burbank v. Wright*, Minn., 47 N. W. Rep. 162.

74. MORTGAGE.—The grantee in an absolute deed which is in effect a mortgage may purchase the equity of redemption without the execution of a formal deed, when such purchase is made for an adequate consideration, and without fraud.—*Scanlan v. Scanlan*, Ill., 25 N. E. Rep. 652.

75. MORTGAGE—Foreclosure—Growing Crops.—A vendee of land, who assumes the payment of a mortgage thereon, stands in the position of a mortgagor in possession, and on foreclosure sale the growing crops planted by him while so in possession pass to the purchaser as accessories to the land. Distinguishing Jenkins v. McCoy, 50 Mo. 348.—*Hayden v. Burkemper*, Mo., 14 S. W. Rep. 767.

76. MUNICIPAL CORPORATIONS—Parks.—Under Rev. St. Ill. 1889, ch. 105, § 50, which empowers park commissioners "to connect any public park * * * with any part of any incorporated city * * * by selecting and taking any connecting street or streets * * * leading to such park," the commissioners, after selecting and taking such a street, may afterwards take an additional street for the same purpose, though such additional street is parallel to the other, and only four blocks from it, since the power is not necessarily exhausted by a single selection.—*West Chicago Park Com'rs v. McMullen*, Ill., 25 N. E. Rep. 676.

77. MUNICIPAL CORPORATION—Repairs of Sidewalk.—The village council of a village organized under the general statute relating to villages, *held* to have power

to cause a sidewalk to be constructed, and to purchase material therefor of their own motion, without petition from the owners of the adjacent lands, and without an assessment of the expense being first made upon the adjacent property. Gilfillan, C. J., dissenting.—*Bradley v. Village of West Duluth*, Minn., 47 N. W. Rep. 166.

78. MUNICIPAL IMPROVEMENTS—Assessments.—Under Rev. St. Ind. 1881, § 3165, providing that, on appeal from a precept commanding the collection of an assessment for a street improvement, no question of fact arising before the making of the contract shall be tried, the alleged invalidity of the proceedings for such improvement, because the bid for the work was not the lowest, and included additional improvements, is not subject to inquiry on appeal.—*Boyd v. Murphy*, Ind., 25 N. E. Rep. 702.

79. MUNICIAAL IMPROVEMENTS—Grading Streets.—When grading its streets, it is the duty of the city of St. Paul to build and finish such slopes as there may be upon the sides thereof so that they will be in a reasonably and ordinarily safe condition as to such persons as may be lawfully in the streets, and so that they will not unnecessarily and unreasonably endanger the lives and limbs of the passers-by upon the sidewalks.—*Nichols v. City of St. Paul*, Minn., 47 N. W. Rep. 168.

80. MUTUAL BENEFIT INSURANCE—Beneficiary.—Where the application for membership, directed payment of the benefit to the applicant's wife, "subject to such future disposal" as he might thereafter direct, and the benefit certificate was in terms payable to the wife, and no mode of changing the beneficiary was specified by the laws of the association, though the practice was to require a surrender of the old certificate, and to issue a new one, payable to the new beneficiary, a paper signed by the member, expressing his surrender of the certificate, and directing payment to new beneficiaries, and mailed to the officers of the association, just before his death, is a valid change of beneficiary.—*Hirschl v. Clark*, Iowa., 47 N. W. Rep. 78.

81. NATIONAL BANKS—Shareholders.—One who subscribes and pays for a specified number of shares of a "proposed increase" of the capital stock of a national bank, which increase is in fact never issued, and to whom the bank officials transfer, instead, old stock of the bank without his knowledge or consent, is not a "shareholder" within the meaning of Rev. St. U. S. § 5151, imposing individual liability on the shareholders for the debts of national banks.—*Stephens v. Follett*, U. S. C. C. (Minn.) 43 Fed. Rep. 842.

82. PARTITION—Judgment—Appeal.—In an action for partition, the judgment provided in section 8, ch. 74, Gen. St. 1878, is the final judgment, and, upon an appeal from it, the judgment provided in section 6, is open to review.—*Dobberstein v. Murphy*, Minn., 47 N. W. Rep. 171.

83. PARTNERSHIP—Fraudulent Conveyances.—In an action for goods claimed by plaintiff under a chattel mortgage given him by a firm on a partnership property, and which he testifies was given to secure payment of money loaned to the firm, the facts that the firm books show no credit to plaintiff for money loaned, and that no note was given, or agreement made as to when the money should be repaid, may be considered in determining whether the debt was valid, and whether the mortgage was fraudulent.—*Hagen v. Campbell*, Wis., 47 N. W. Rep. 179.

84. PARTY-WALLS—Rights of Adjoining Owners.—Under an agreement between the owners of adjoining lots providing that one may build a party-wall resting one-half on each lot, and that the other should have the right of joining thereto on paying one-half its value, the one by whom the wall is built may be enjoined from placing therein doors or other openings, though there is neither allegation nor proof that the other ever intends to use the wall. — *Harber v. Evans*, Mo., 14 S. W. Rep. 750.

85. PLEADING— Joinder of Actions. — Under Rev. St. Mo. 1889, § 2040, plaintiff in an action for the maintenance of a nuisance may properly unite in his petition a prayer for damages sustained thereby with a prayer for an injunction against its continuance. — *Paddock v. Somes*, Mo., 14 S. W. Rep. 746.

86. PRINCIPAL AND AGENT. — An agent for a party in effecting a sale of land to himself although acting in entire good faith is accountable for the profit made.—*McNult v. Dix*, Mich., 47 N. W. Rep. 212.

87. PRINCIPAL AND AGENT — Authority of Agent. — A walking boss for railway contractors, whose duty it is to see that the subcontractors properly perform their contracts, and who has authority to compel them to keep sufficient men on the work to fulfill their contracts, can pledge his principals to pay the board bills of laborers for whom he obtains board upon his promise that the bills will be paid. — *Cannon v. Henry*, Wis., 47 N. W. Rep. 186.

88. PUBLIC LANDS—Location.—The location of a portion of the lands called for by a certificate, which is owned by two persons, will be held to be in the interest of both owners, unless it affirmatively appear that the location was made in behalf of one of them only.—*Kirby v. Estell*, Tex., 14 S. W. Rep. 695.

89. RAILROAD COMPANIES — Crossings. — Crossing a railroad track on a public highway, where there are a number of side tracks, is not negligence *per se*, though by going a few blocks out of his way the traveler might have crossed the track at a safer place. City of Centralia v. Krouse, 64 Ill. 19, distinguished. — *C. R. I. & P. R. Co. v. Clough*, Ill., 25 N. E. Rep. 664.

90. RAILROAD COMPANIES — Negligence. — A railroad company is liable in damages to the owner of a dog, which is killed while trespassing upon the track, by the willful or intentional negligence of an engineer, or by his failure to exercise ordinary care and skill to prevent the injury.—*St. Louis, etc. Ry. Co. v. Hanks*, Tex., 14 S. W. Rep. 691.

91. RAILROAD COMPANIES—Negligence. — In an action against a railroad company the declaration alleged that plaintiff was employed as a common laborer on a gravel train, and that he was ordered by the foreman to uncouple two cars of the train and then to jump from one to the other while one or both were in motion; that, when he attempted to do so the foreman, without warning, let off the brake, and thus increased the risk so that when plaintiff jumped he fell between the cars and was injured. It further alleged that this work was not in the line of plaintiff's employment; that he had no experience on it, and was not acquainted with the inherent danger, but did as he was told for fear of being discharged: *Held*, that the declaration states a cause of action. — *Erickson v. Milwaukee, etc. Ry. Co.*, Mich., 47 N. W. Rep. 237.

92. RAILROAD COMPANIES—Negligence.—Where a trespasser, walking along a railroad track is struck and injured by a train, the liability of the railroad company depends upon the question whether those in charge of the train, after discovering that he was not going to leave the track, used all the means in their power to stop the train before it struck him.—*Saldana v. Galveston, etc. Ry. Co.*, U. S. C. C. (Tex.), 43 Fed. Rep. 862.

93. REPLEVIN — Defenses. — In an action of replevin, each party pleading in general terms that he has title to the property and denying the alleged by the other party, the defendant may avail himself of the defense that the conveyance under which the plaintiff claims title was fraudulent and void as to the defendant. — *Mullen v. Noonan*, Minn., 47 N. W. Rep. Rep. 164.

94. SALE—Evidence. — In an action for the price of a pump, where defendants deny the sale, and allege that the pump had been placed on their premises by plaintiff as an advertisement, it is error to exclude the testimony of a disinterested witness that, at the time of the alleged sale, plaintiff said he was putting in the pump simply as an advertisement, and the error is not cured by permitting defendants themselves to testify to that fact.—*Packard v. Backus*, Wis., 47 N. W. Rep. 163.

95. TAXATION — Illegal Tax — Recovery. — State v. Nelson, 41 Minn. 25, 42 N. W. Rep. 548, followed, sustaining the right of one who is compelled to pay an illegal tax, to avoid serious prejudice to important property rights, to recover the money paid.—*Mearkle v. Board of County Commissioners*, Minn., 47 N. W. Rep. 165.

96. TAXATION—Tax-titles.— Under Laws Ill. 1871-72 p. 31, § 122, which provides that town authorities shall annually, on or before the second Tuesday in August, certify to the county clerk the amount they require to be raised by taxation, a tax levy based on a certificate filed after that date is void.—*Gage v. Nichols*, Ill., 25 N. E. Rep. 672.

97. TAX SALE—Redemption.— Where suit is brought to enforce the paramount lien for unpaid taxes against two lots on which a deed of trust has been given, and the parties named in the deed are made defendants, but the assignee of the note secured by the deed is not made a party, such assignee can redeem from the tax-sale upon payment to the purchaser of the value of his permanent improvements made in the belief that he had acquired a good title. — *Boatmen's Sav. Bank v. Grieve*, Mo., 14 S. W. Rep. 708.

98. TRIAL—Mistake.—Before announcing ready for trial, the plaintiff should be prepared with evidence to maintain the action, not merely to change the burden of proof. Where known witnesses to material facts alleged in the declaration are absent, and there has not been time since discovering them to take their testimony by interrogatories, and the plaintiff voluntarily goes to trial instead of applying for a continuance, the absence of these witnesses, though afterwards fully accounted for, will be no cause for a new trial.—*Crawford v. Georgia Pac. Ry. Co.*, Ga., 12 S. E. Rep. 176.

99. TRIAL—Physical Examination of Plaintiff.—In a suit for an injury to the person, the court should not appoint physicians to make an examination, when the party is willing to be examined by competent and disinterested men without such an order.—*Gulf C. & S. F. Ry. Co. v. Norfleet*, Tex., 14 S. W. Rep. 703.

100. TRIAL BY COURT—Findings of Fact.—After a circuit judge has determined how he will decide a case tried before him without a jury, there is no impropriety in his request that the attorney for the prevailing party prepare and present a statement of facts as shown by the evidence. Such statement is not obligatory on the judge, the opposing party is entitled to prepare amendments, and the facts are finally settled by the court.—*Bateman v. Blaisdell*, Mich., 47 N. W. Rep. 223.

101. USURY—Contract.—The owner of lands forfeited to the State for non-payment of taxes, borrowed money to redeem the lands, giving a usurious note therefor, and having the lands conveyed to the lender as security: *Held* that, the State not being a party to the usurious contract, it did not affect the conveyance of the State, but that all the interest of the State passed to the lender as trustee for the borrower.—*Love v. Loomis*, Ark., 14 S. W. Rep. 674.

102. VENDOR AND VENDEE.—A complaint showing a payment by the plaintiff to the defendant of the price of land, under a verbal contract on the part of the defendant to convey the same, and showing the refusal of the defendant to so convey: *Held*, to state a cause of action at least for the recovery of the money paid.—*Pressnell v. Lundin*, Minn., 47 N. W. Rep. 161.

103. VENDOR AND VENDEE—Destruction of Premises.—A vendee who takes possession of the land intended to be conveyed, and pays part of the purchase price, is the equitable owner of the land, though the deed under which she claims contains an erroneous description; and she, and not the vendor, must bear the loss occasioned by the burning of a dwelling-house on the premises while she was so in possession. Distinguishing Wells v. Calnan, 107 Mass. 514.—*Wetzler v. Duffy*, Wis., 47 N. W. Rep. 184.

104. VENDOR AND VENDEE—Fraud.—If by a false and fraudulent oral promise, which he intends at the time of making it afterwards to violate, the vendee of two contiguous parcels of land, which he has contracted for by separate and distinct contracts, induces the vendor to convey to him both parcels by one and the same absolute unconditional deed, he paying for one parcel, but not for the other, equity by reason of his fraud will fasten upon him a constructive trust in behalf of the vendor, as to the parcel not paid for, although the two parcels are not described in the deed as several tracts, but both together are treated as one tract.—*Brown v. Doane*, Ga., 12 S. E. Rep. 179.

105. WATER AND WATER-COURSES—Drainage of Highways.—The commissioners of highways have no right in draining a road to collect and carry along the road a quantity of water, which would naturally drain off in another direction, and discharge such accumulated water on an adjoining farm.—*Young v. Commissioners*, Ill., 25 N. E. Rep. 689.

106. WILLS—Construction.—Where testator devised to his son 20 acres of land, describing it by metes and bounds, and was the owner of land answering such description, the description must prevail though such land is not "joining" other land of the son as elsewhere stated in the will, and though testator had lands that did join.—*Wales v. Templeton*, Mich., 47 N. W. Rep. 288.

107. WILLS—Contest—Evidence.—Under Rev. St. Ill. ch. 148, § 7, which provides for the contest of a will by suit in equity in which the issue shall be tried by a jury, the judge has no more right to direct a verdict in such a suit than in an action at law.—*Purdy v. Hall*, Ill., 25 N. E. Rep. 645.

108. WILLS—Right of Devisees.—Plaintiff's husband left by will his real estate to plaintiff for life, and after her death a portion of such real estate to his son, and the remaining portion to his daughter. The daughter and her only child died in testator's life-time, and the son, after her death. Under Rev. St. Ind. 1881, § 2483, plaintiff elected to take under the will: *Held*, that the devise to the daughter lapsed, there being no residuary legatee; that, by her election to take under the will, plaintiff divested herself of her one-third in the land, the subject of such devise, but retained her interest, as heir of her husband, to one-half of said land; and that plaintiff's third-interest in the land devised to the son was also divested because of her said election.—*Collins v. Collins*, Ind., 25 N. E. Rep. 704.

109. WILL—Evidence.—In an action to set aside a will on the ground that testator was of unsound mind, the will and probate thereof are admissible in evidence, though the probate contains the *ex parte* affidavits of subscribing witnesses as to testator's sanity.— *Summers v. Copeland*, Ind., 25 N. E. Rep. 555.

110. WILLS—Legacy Charged on Land.—Testator gave a sum to his son "to be made out of my estate. When the above amounts have been paid, I direct that the remainder of my whole estate be equally divided among my heirs:" *Held*, that as the land was not specifically devised, but only in remainder, the legacy was made a charge, and it was not necessary in order to establish a lien to allege and prove that testator had no personality at the time of the execution of the will.— *Davidson v. Coon*, Ind., 25 N. E. Rep. 601.

111. WILL—Trusts—Estoppel.—An untrue recital in a will that the testator has conveyed certain property in trust does not constitute either a devise or a declaration of trust.—*Hunt v. Evans*, Ill., 25 N. E. Rep. 579.

112. WILLS—Witnesses.— The nuncupative testament by public act need contain no other description of the witnesses than their names, their number, and their residence. It need not expressly negative the existence of incapacities, which are matters for exterior proof, as ground of nullity. — *Succession of Del Escopal*, La., 8 South. Rep. 268.

113. WITNESSES—Transactions with Decedent.—In replevin against one who has taken possession of property of a decedent under a trust deed executed by him, plaintiff cannot prove title by his own testimoney, under Code Miss. § 1602. *Jackson v. Smith, etc.*, Miss., 8 South. Rep. 267.